SLOVENSKI STANDARD
oSIST prEN 17371-2:2020

01-julij-2020

Zagotavljanje storitev - 2. del: Pogodbe o storitvah - Navodilo za oblikovanje, vsebino in strukturo pogodb

Provision of services - Part 2: Services Contracts - Guidance for the design, content and structure of contracts

Dienstleistungserbringung - Teil 2: Dienstleistungsverträge - Leitlinien für die Gestaltung und Struktur von Verträgen

Prestation de services - Partie 2 : Contrats de services - Recommandations pour l'élaboration, le contenu et la structure des contrats

Ta slovenski standard je istoveten z: **prEN 17371-2**

ICS:

03.080.01	Storitve na splošno	Services in general

oSIST prEN 17371-2:2020 **en,fr,de**

EUROPEAN STANDARD

NORME EUROPÉENNE

EUROPÄISCHE NORM

DRAFT
prEN 17371-2

June 2020

ICS 03.080.01

English Version

Provision of services - Part 2: Services Contracts - Guidance for the design, content and structure of contracts

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EUROPEAN COMMITTEE FOR STANDARDIZATION
COMITÉ EUROPÉEN DE NORMALISATION
EUROPÄISCHES KOMITEE FÜR NORMUNG

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European foreword

This document (prEN 17371-2:2020) has been prepared by Technical Committee CEN/TC 447 “Horizontal standards for the provision of services”, the secretariat of which is held by BSI.

This document is currently submitted to the CEN Enquiry.

This document has been prepared under a mandate given to CEN by the European Commission and the European Free Trade Association.

Introduction

This document is part of a series of European Standards that address different phases in the provision of services (see Figure 1): the service procurement phase (FprEN 17371-1), the service contracting phase (prEN 17371-2) and the service execution phase (FprEN 17371-3).

Each part of the series can be used individually or in combination with the other parts.

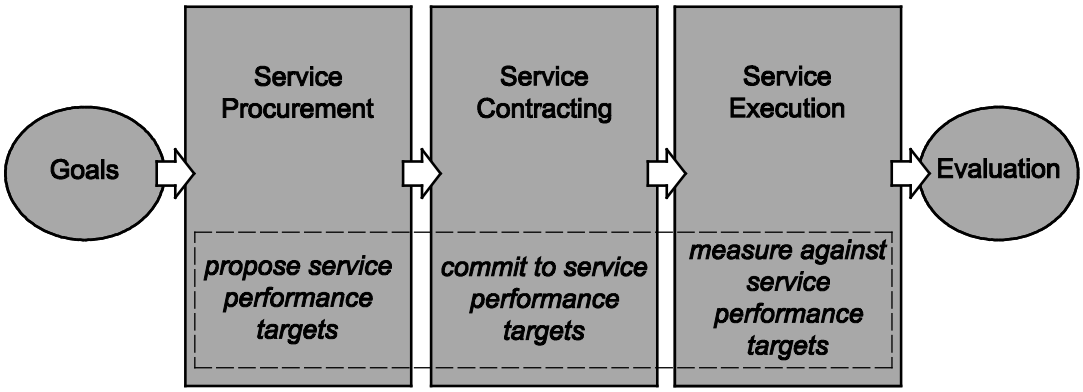

Figure 1 — Phases in the provision of services

The drafting of the series was initiated after CEN presented the findings of a study on the potential and a possible impact of horizontal service standards on the EU single market for services. This study was as a response to the standardization request M/517 from the European Commission for programming and development of horizontal service standards. The objective of this standardization request was to encourage the development of voluntary European Standards covering issues common to many service sectors. Such standards should aim to facilitate compatibility between service providers and improve information and the quality of services to the recipient.

This document addresses the service contracting phase and has been developed to provide organizations with guidance on the design, content and structure of service contracts. No part of this document is intended to be mandatory for inclusion in a service contract; rather it is structured to enable organizations entering into a service contract to identify the solution best suited to achieve the intended business outcomes. The guidance lists the key components of a service contract that organizations might think through as part of the broader solution being contracted. Based on the nature of services being contracted, the service buyer and service provider can decide upon the specific components for their service contract. This document does not provide guidance regarding the applicable legal rules and regulations.

1 Scope

This document provides guidance on the design, content and structure of service contracts. It is aimed at buyers and service providers entering a contractual relationship who do not necessarily have legal training. The guidance set out in this document does not constitute legal advice.

This document is applicable to:

a) service buyers and service providers regardless of type, size or the nature of the services;

b) service providers who may be inside or outside the service buyers' organization; and

c) any interested parties who are directly or indirectly involved in or affected by a procurement process.

This document is not applicable to business-to-consumer (B2C) service contracts or for works contracts.

NOTE 1 'Works contracts' are contracts that have as their object the execution, or both the design and execution, of a work are not covered. Contracts having as their object only the design of a work are covered.

NOTE 2 'Work' means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function.

2 Normative references

There are no normative references in this document.

3 Terms and definitions

For the purposes of this document, the following terms and definitions apply.

ISO and IEC maintain terminological databases for use in standardization at the following addresses:

- IEC Electropedia: available at https://www.electropedia.org/
- ISO Online browsing platform: available at https://www.iso.org/obp

3.1
contracting parties
service buyer and service provider being parties to a service contract (each a contracting party)

3.2
service buyer
organization that buys services from a service provider

Note 1 to entry: In public procurement, the service buyer may also be known as the contracting authority/entity.

3.3
service contract
agreement between a service buyer and service provider setting out their legally binding rights and obligations for the provision of services

3.4
service order
agreement between a service buyer and service provider that sets out the scope and specifications of services to be provided under the service contract

3.5
service performance target
target level of a key performance indicator to express the need, expectation, or obligation of service buyer

3.6
service provider
organization that offers or delivers one or more services

4 Service contracts — principles

4.1 What is a service contract and what purpose does it serve?

Service contracts form legally binding agreements between the service buyer and service provider that enter into them and have the key purpose of providing clarity on who is ordering a service, who is providing the service, what service should be provided, where and when and for what remuneration. The service contract should be in writing, as well as dated and signed by the service buyer and the service provider. What does a "good" service contract look like?

What "good" looks like will vary depending on the circumstances (in most situations there is no such thing as a "standard contract"). The contracting parties should strive to ensure that whatever clauses are included in the service contract, those clauses are drafted using straightforward, clear and concise wording. The service contract should aim to be as short as possible but as long as is necessary.

4.2 Service contract structures

It is important that the necessary contents of a service contract are brought together into a clear structure. While there are certain basic elements that should be present in all service contracts (as mentioned in subclause 4.1 above), the length and structure may vary considerably.

Service contracts based on common law systems (such as English law) tend to be longer than in civil law systems (like much of the rest of Europe) as few provisions are implied by law therefore the service contract tends to be more comprehensive in setting out all of the terms which will govern the supply of services. In civil law systems much of the law is codified and will apply to contracts they govern unless otherwise specified.

The service contract may take the form of a framework agreement which provides a structure and mechanism for ordering and providing services from time to time on the terms established under the service contract. Often this mechanism involves completing a service order which sets out, within the terms under the framework, the specific services, specifications and obligations in respect of the services, service standards, economics and other considerations that determine and impact the delivery of services.

In order to keep larger and more complex service contract easier to read and manageable, specific elements of the service contract are often dealt with in schedules, exhibits or attachments to the main agreement such as with lengthy service descriptions, service level and credit mechanisms or charging mechanisms.

Examples of simple service contract structures are set out as EXAMPLE 1 and 2 in Annex A. More complex framework agreement examples are set out as EXAMPLES 3 and 4 of Annex A. There is no fixed rule on which party will establish the basis of the service contract. In some cases, it may be established by the service buyer possibly through and as part of the service procurement process (see FprEN 17371-1) while in other cases it may be established by the service provider.

5 Service contract components

5.1 General

This clause provides an overview of the key components that may be found in a service contract, details each component, their function and purpose.

Annex B sets out drafting examples of service components described in this clause and are provided for illustration purposes only.

In order to enable the contracting parties to approach discussions from a business-orientated standpoint, the contractual components to be considered have been grouped under the following themes:

— Who is entering into the service contract? (subclause 5.2)

— What are the services – how are they specified, ordered and what are the service performance targets? (subclause 5.3)

— How are charges calculated and paid? (subclause 5.4)

— What legal system governs the service contract? (subclause 5.5)

— How will the contracting parties deal with disputes? (subclause 5.6)

— What is the exposure? (subclause 5.7)

— What rights are there in and to the service outputs? (subclause 5.8)

— When does the agreement commence, how is it terminated and what are the consequences of termination? (subclause 5.9)

— What considerations relate to information/data? (subclause 5.10)

— Making changes to the agreement and the contracting parties' relationship (subclause 5.11)

— What other terms need to be considered? (subclause 5.12)

5.2 Who is entering into the service contract?

In general, the obligations, rights and remedies under a service contract will apply to, and be enforceable by, only the contracting parties to such agreement. Therefore, it is important to clearly identify which legal entities are entering into the service contract.

Where the contracting parties are not identified or are not correctly or sufficiently identified, then there is a risk that the service contract is either not enforceable or that it is enforceable but against an unintended party. This could happen, for example, where one of the contracting parties is referred to as XYZ and is a member of a group of companies with similar names, meaning it is not clear if the contracting party refers to XYZ [Subsidiary] Limited or its parent company XYZ Limited.

Service contracts should clearly identify the contracting parties to such service contract. To do this it is useful to include any registration details such as a company registration number or registered office where these are listed in an official database e.g. Companies House for English registered companies, the German Commercial Register for German registered companies or the Registre de Commerce et des Sociétés for French companies.

If there are more than two parties entering into the service contract (for example, more than one entity on the service buyer or service provider side) then each additional party should be specified and thought

should be given as to which terms will apply to which parties. This document and the drafting examples in Annex B assume there are two parties to the service contract, the service buyer and service provider.

The service contracts signed on behalf of an organization should be signed by authorized representative of the contracting parties and identified in the service contract.

5.3 What are the services – how are they specified, ordered and what are the service performance targets?

5.3.1 Service description

A fundamental component of the service contract is the service scope and description which defines the services which are being sourced by the service buyer from the service provider. In service contracts developed by the contracting parties in a collaborative manner with the intent of building a positive relationship, the service buyer specifies what it wants and shifts the responsibility of determining how the work gets delivered to the service provider. Whilst this is a general principle, it should be remembered that in the context of some services being contracted, the contracting parties need to consider if there is a need for a detailed description of how the services are provided or whether the focus should be on the composition of services being provided. In either context it is very important for contracting parties to spend time to get this component correct as this would determine the services that eventually get delivered by the service provider, not just what gets delivered but also its efficiency, effectiveness and future transformation.

For each service being delivered the contracting parties should consider which party does the requirement fall on, what are they required to do, where should it be done, by when and (where relevant) in what manner (the who, what, where, when and how) and then detail this in the service contract.

Annex C provides considerations to be kept in mind while designing the service scope and description.

5.3.2 Transition and preparation/transformation to or during the provision of services

For some service contracts there may be a need for an initial transfer of people, assets and/or processes from either the service buyer or the incumbent service provider being replaced. Once such transition activities have been completed, the incoming service provider would then be able to commence with the supply of services to the service buyer.

Transformative activities entail making changes to the provision of such services so what the service buyer then receives will be different to what was being supplied previously.

Where such activities are required within the scope of the service contract, the contracting parties may consider:

— What the scope of such services are (see subclause 5.1).

— What the output or deliverables of the services are.

— When such activities should be completed by i.e. a milestone date.

— What the consequences of failing to reach such a milestone would be (termination, liquidated damages, etc.).

5.3.3 Mechanism for ordering services

This service component addresses the theme of how the service contract allows the service buyer to order services.

Along with a description of the services being provided, the contracting parties should consider whether the service contract needs to set out a process for how the services will be ordered throughout its duration. For some service contracts it may be appropriate for all services to be provided from the date

the service contract becomes effective, while for others the supply of services may only be needed on a project-by-project basis in which case the service contract should specify the mechanism for ordering such services.

Another consideration which should be addressed in the service contract if applicable is whether group companies of the contracting parties entering into the service contract may order and supply services under the terms of the service contract using the same mechanism.

5.3.4 Service performance targets

5.3.4.1 General

FprEN 17371-3 provides guidance and a model for defining a service measurement structure to facilitate service monitoring, measurement analysis and evaluation.

Service performance management is an important component in service contracts to ensure the robust and efficient management of performance of services agreed between the contracting parties. In keeping with the spirit of building a relational contract, this component is aimed at a collaborative exercise between the contracting parties to achieve the desired performance levels. The allocation of responsibility outlined in subclause 5.3.1 forms the basis for this component by outlining the performance levels expected of the service provider on the assumption that the service buyer discharges its obligations.

Service performance management should be viewed as a means to provide insight into service delivery and to drive continuous improvement. Too much emphasis on a large set of metrics could drive focus towards the minutiae, losing sight of the bigger picture.

Cost and effort are also expended in tracking, measuring, collating and reporting performance metrics so this effort should be focused on key metrics.

The service management framework in the service contract should be based on the following principles:

- Provide a comprehensive framework to measure end-to-end process performance;
- Align service metrics with the desired business outcomes;
- Establish transparent and clear allocation of responsibility and accountability for service delivery between the service buyer and service provider;
- Establish governance protocols (including financial mechanisms) embedded in the service management framework to ensure continuous performance review, ongoing course correction and service improvement;
- Provide stability in service performance;
- Provide visibility and transparency of service performance to all stakeholders; and
- Drive behaviour to actively move service performance targets to higher global performance levels over the life of the service contract.

5.3.4.2 Service performance metrics

5.3.4.2.1 Definition

Service performance metrics are indicators of the performance of services being delivered as part of the service contract, including both those delivered by the service provider and the end-to-end service covering activities retained by the service buyer.

The process of designing these metrics is covered in FprEN 17371-3. Once identified, the service performance management mechanism to be included in the service contract should consider the following:

— What is the service or event being measured?

— Over what period of time are the measurements to be assessed (daily, weekly, monthly, annually)?

— What is the standard of performance to be achieved e.g. 98 % of service availability?

— Will there be a burn-in period where the parties collect data and agree on a realistic baseline for measurement? (see 5.3.4.3)

— Are there any exclusions from such measurements e.g. downtime of a platform while routine maintenance takes place?

— Which party will measure and report against the service performance targets and how often?

— How can the contracting parties modify, add or remove any service performance targets over time?

— What is the impact of failing to meet a service performance target?

— If financial penalties (also termed service credits) apply, will they be deducted immediately or upon request?

— Is there a cap on the amount of service credits?

— Are service credits the sole and exclusive remedy for a service performance target failure or are they in addition to other rights (including termination)?

5.3.4.3 Data collection and baseline process

It is very important for the service contract to include baseline measurements for all metrics including volume metrics. The importance of the baseline lies in being the starting point for all future measurements over the term of the service contract. The baselines should be agreed by the contracting parties using the agreed measurement definition and methodology. It is advisable for both contracting parties to consider the need for undertaking a baseline exercise. While it may be expedient in the short term, it can have significant adverse effect over the term of the service contract. Hence it is a decision that should not be taken lightly.

Further, it is also important to agree and document in the service contract the baselining methodology. For example, to arrive at a baseline for a metric measured monthly, would six months data suffice or 12 months, how would data outliers be handled etc.? Baselining is not just a one-off activity to be performed at the start of the service contract but would need to be undertaken during the term of the service contract should a new metric be introduced.

In some instances, historical data may not be available, either at the commencement of the service contract or during its term. To address this situation, service contracts use a concept known as a “Burn-In period” to enable the contracting parties to track and measure the metric for an agreed length of time. At the end of this period, the contracting parties agree to a baseline derived from the measurements during this period.

Some service contracts suspend the service penalty in respect of service performance metrics within the duration of the burn-in period.

5.3.4.4 Governance of service performance management

5.3.4.4.1 General

Governance of service performance management relates to the way the contracting parties would manage on-going service performance through the service performance management framework. It comprises:

— Performance measurement and reporting;

— Service monitoring and review;

— Non-performance at agreed service performance targets;

— Changes to service metrics.

5.3.4.4.2 Performance measurement reporting

The service contract should specify the performance measurement and reporting obligations of the service provider.

5.3.4.4.3 Service monitoring and review

Service performance should be monitored and reviewed by the contracting parties as per the protocols established under the governance structure of the service contract.

5.3.4.4.4 Non-performance at agreed service performance target

5.3.4.4.4.1 General

Over the term of the service contract it is likely that the service provider may miss delivering at the agreed objectives as measured by service metrics. The service performance management framework should clarify actions and implications of the service provider's failure to meet agreed service standards.

Service contracts follow a two-step process to address this situation:

a) Root cause analysis and remediation plan

b) Financial service credits

5.3.4.4.4.2 Root cause analysis and remediation plan

When a service metric is missed, the first action is for the service provider to perform a root cause analysis to identify the source of the failure and obtain the service buyer's approval. Along with identifying the root cause for failure, the service provider should develop a remediation plan and implementation actions to remediate.

5.3.4.4.4.3 Financial service credits

The root cause for failure could lie entirely upon the service provider, or on the side of the service buyer or a combination of the two.

For failures due to the service provider, service contracts often couple service performance targets with service credits (either a fixed sum or expressed as a percentage of the service fees) as a mechanism to penalise failures to achieve agreed service performance targets. Service credits are sometimes seen as a blunt instrument to drive the right behaviour from the service provider but are still commonly used, particularly in an outsourcing agreement.

5.3.4.4.5 Incurrence of service credits

Service contracts typically identify service metrics that are subject to an obligation for the service provider to pay the service buyer a service credit if these metrics do not meet agreed service performance targets. This obligation occurs only when the failure to meet agreed service performance targets is entirely due to factors caused by the service provider. If the service provider fails to meet the agreed service performance targets due to the service buyer organization, then the principle of fairness demands that the service provider is excused of its obligation due to the failure to meet service performance targets.

The intent of a service credit mechanism is not to place unreasonable burdens upon the service provider.

The typical construct of a service credit mechanism comprises the following:

— Amount at risk: Usually computed as a percentage of service charges corresponding to the reporting period of the metric. For example, if the metric is measured and reported monthly, then the amount at risk is computed as a percentage of the monthly service charges.

— Percentage amount at risk allocated to the metric – Service Metric Weight: Where there are multiple service metrics being measured and subject to service credits, each metric is accorded a specific weight. The weight reflects the relative importance of the metric within the broader portfolio.

— Service credit is then computed by multiplying the amount at risk by the Service Metric Weight.

In some service contracts, the concept of service weights is done away with, rather applying a standard weight to all service metrics or by equating the service credit to a flat percentage of service charges. Irrespective of the construct of the service credit mechanism, it needs to be recognized that in relational service contracts the focus of the contracting parties needs to be on improvement and learning from failures. Emphasis needs to be on remedying the failure and to initiate actions to prevent their recurrence.

5.3.4.5 Changes to service metrics

As the business evolves over the term of the service contract, it may become essential to modify the original set of service metrics. It is advisable that service metrics are changed using the Contract Change Control process. The process should follow the same steps as at the start of the service contract.

In line with the spirit of continually creating economic value over the term of the service contract, many relational service contracts have a provision to automatically increase service performance targets each year of the service contract. The methodology for the annual automatic increase is included in the service contract and hence does not require the Contract Change process to record annual changes.

5.3.5 Business continuity and disaster recovery planning

5.3.5.1 The purpose

Where the services bring provided are business critical to the service buyer and any disruption to their supply would have a material impact on the service buyer then it may be appropriate to require the service provider to have in place and maintain a business continuity and disaster recovery plan (BC and DR plan) describing the processes and procedures to be followed in the event of a disaster and/or unexpected event.

The aim of such an obligation is to ensure the service provider is able to recover from a disaster and/or unexpected event and resume operations within a suitable timeframe to minimize the impact of the supply of services to the service buyer. The ability to minimize the effects of a disaster and/or unexpected event is often preferable to having contractual remedies (such as damages) for a failure to provide those affected services.

5.3.5.2 Components of a business continuity and disaster recovery plan

A business continuity and disaster recovery plan should comprise the following components:

— Business impact analysis — risk assessment to identify key services or aspects of services and sites that may be affected, and the risks associated;

— Establishment of crisis management teams (service buyer and service provider) and contact details to be notified in the event of a disaster and/or unexpected event;

— Roles and responsibilities of each, service buyer and service provider, under the BC and DR plan;

— Timescales for implementing the BC and DR plan;

— Back-up process and components of the configuration;

— List of equipment and technology infrastructure to be provided by service provider in the event of a disaster and/or unexpected event;

— Testing process and schedule;

— Training programme for both service buyer and service provider personnel;

— Governance process to documenting changes and updating the BC and DR plan.

5.4 How are charges calculated and paid?

5.4.1 General

This component addresses the question of how the contracting parties structure and manage the economics of the service contract over its term. Across the different contract components, this remains one of the most contested and debated, not just during the initial negotiations but over the life of the service contract. Disagreements between the contracting parties on pricing have led to the collapse of negotiations, with the service buyers having to restart discussions with a new service provider.

Ensuring the economics of the service contract is correct is critical for the success of the relationship, both from the point of meeting the objectives and intent, and to facilitate the creation of a positive and healthy relationship between the two contracting parties. Whilst it is essential for each side to arrive at a deal that is best for them, most contracting relationships fail to achieve this objective. Some of the reasons for this are:

i. Fair return

For contractual relationships to be successful, it is essential that both sides earn a fair return to allow for investments to transform, adapt and enhance the relationship. Service contracts whose economic models are designed to drive to lowest costs often fail to create either the right behaviour or financial incentives to grow and adapt, ultimately failing to meet the intended objectives.

In summary, it is essential for contracting parties to build an economic model that allows for a fair return for both sides, creates flexibility to adapt to evolving business conditions, ensures transparency and enables a healthy relationship to be built.

ii. Service contracts are uncertain

Service contracts are designed on the assumption that it is possible to identify and price all possible scenarios for costs and revenue over the term of the service contract. Following on from this assumption