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

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

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

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

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COMITÉ EUROPÉEN DE NORMALISATION
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prEN 17371-2:2019 (E)

European foreword

This document (prEN 17371-2:2019) has been prepared by Technical Committee CEN/TC 447 “Horizontal standards for the provision of services”, the secretariat of which is held by BSI.

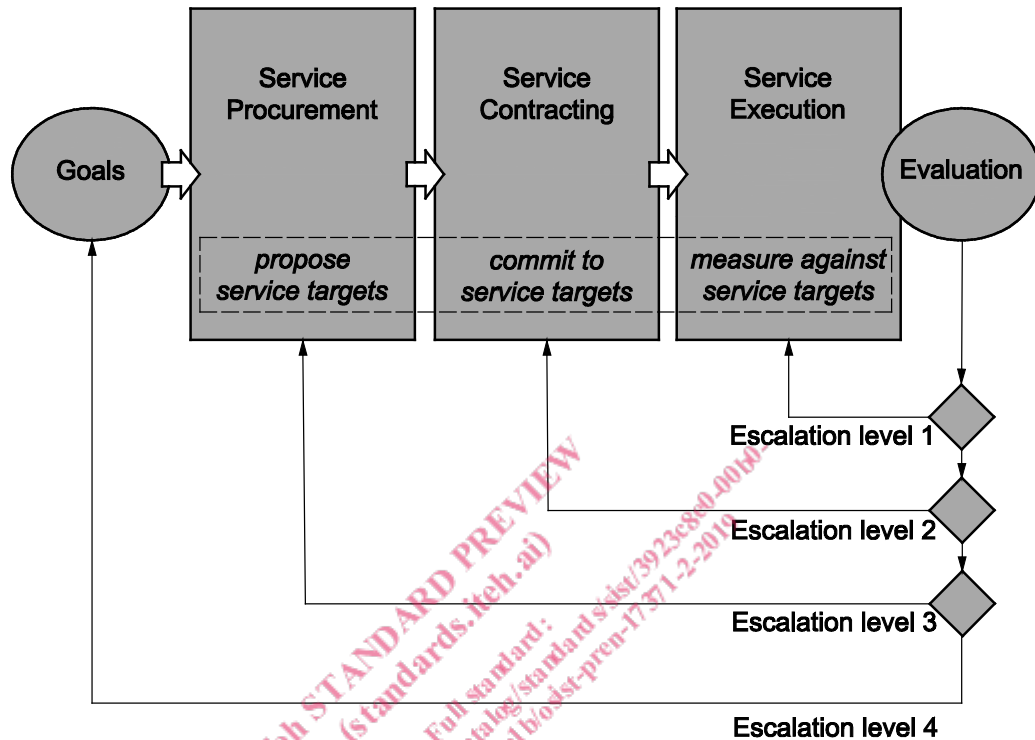
This document is currently submitted to the CEN Enquiry.

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Introduction

This document is part of a series of European Standards that address different phases in the provision of services: the service procurement phase, the service contracting phase and the service execution phase.



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 services supplied by providers in different Member States, improve information to the recipient and the quality of services offered in the EU.

This document addresses the service contracting phase and has been developed to provide organizations with guidance on the content, design 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.

1 Scope

This document provides guidance on the design and structure of service contracts. It is aimed at buyers and service providers entering a contractual relationship who do not necessarily have legal training.

This document is applicable to any organization regardless of its type or size.

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 <http://www.electropedia.org/>
- ISO Online browsing platform: available at <http://www.iso.org/obp>

3.1

consumer

individual member of the general public purchasing or using goods, property or services for personal, family or household purposes

Note 1 to entry: Adapted from the ISO/IEC Statement on Consumer participation in Standardisation work

3.2

contracting parties

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

3.3

organization

person or group of people that has its own functions with responsibilities, authorities and relationships to achieve its objectives

Note 1 to entry: The concept of organization includes, but is not limited to, sole-trader, company, corporation, firm, enterprise, authority, partnership, association (3.2.8), charity or institution, or part or combination thereof, whether incorporated or not, public or private.

Note 2 to entry: This constitutes one of the common terms and core definitions for ISO management system standards given in Annex SL of the Consolidated ISO Supplement to the ISO/IEC Directives, Part 1. The original definition has been modified by modifying Note 1 to entry.

3.4**service contract**

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

3.5**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.

3.6**service performance target**

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

3.7**service provider**

organization or part of an organization that offers, supplies and/or manages one or more services

Note 1 to entry: Service providers can be external or internal to the service buyer's organisation.

3.8**statement of work****SOW**

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

Note 1 to entry: Not to be confused with works contracts which is defined separately and falls outside the scope of this document.

3.9**works contracts**

contracts having as their object the execution, or both the design and execution, of a work. Contracts having as their object only the design of a work are covered

Note 1 to entry: "Work" in this definition 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.

4 Service contracts — principles**4.1 What is a service contract and what purpose does it serve?**

Service contracts establish the agreement the contracting parties have made and assign their rights and obligations in line with the terms of the service contract. Understanding the nature of the agreement is key to its design and operation and importantly establishing its purpose. They impact elements such as its term, specifications of services, performance standards, location and form of delivery of services, and economics of the transactions to name a few. Service contracts relating to the purchase and sale of services, which form the scope of this document, range from the simple to the more complex across multiple parties with services, single or varied, spread over several years, across a single or multiple location, etc.

Irrespective of the nature of the transaction, service contracts serve the key purpose of providing clarity and transparency of the agreement between the contracting parties establishing the basis for a business and economic relationship between the contracting parties.

prEN 17371-2:2019 (E)**4.2 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”) but in general a “good” service contract is one where each party is happy that the benefits of the service contract outweigh the costs and/or risks. That doesn’t mean there should always be equality in contract terms but where one party assumes greater risk than the other, that party should be comfortable that the risk is sufficiently offset against the benefits that party derives from the service 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.

5 Service contract components**5.1 General**

This section provides an overview of the key components that may be found in a service contract, details each component, their function and purpose and provides drafting examples. These examples are only provided for illustration purposes and the contracting parties should seek professional legal advice as to whether they may be appropriate to use for any particular service contract. The wording and scope of such examples may also vary considerably depending on for example, the applicable law governing the service contract, the nature of the services being provided, and the bargaining powers of the contracting parties.

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 thematic questions:

- Who is entering into the service contract?
- What are the services, how are they ordered and what are the standards of service?
- How are charges calculated and paid?
- What legal system governs the service contract?
- How will the contracting parties deal with disputes?
- What is my exposure?
- What rights do I have in and to the service outputs?
- When does the agreement commence, how is it terminated and what are the consequences of termination?
- What considerations relate to information/data?
- What is the intent and scope of the service contract and nature of the appointment?
- How will the contracting parties’ relationship be managed and what framework is in place if changes need to be made?
- What other terms do I need to consider?

5.2 Who is entering into the service contract?

In general, the obligations, rights and remedies under a service contract will only apply to, and be enforceable by, 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 (e.g. where one of the contracting parties is referred to as XYZ and is a member of a group of companies with similar names, it is not clear if the contracting party refers to XYZ [Subsidiary] Limited or its parent company XYZ Limited), then there is a risk that the service contract is either not enforceable or that it is enforceable but against an unintended party.

Service contracts should clearly identify the contracting parties to such service contract. To help clearly identify a contracting party it is useful to include any registration details such as a company registration number or registered office where these are listed in a national database e.g. details for all English registered companies are stored with Companies House and are freely searchable online.

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.

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

EXAMPLE – *two contracting parties, one service buyer and one service provider*

THIS AGREEMENT is made on [insert date]

BETWEEN:

[Service buyer's details] a company incorporated in [jurisdiction] under company registration number [number] and whose registered office is at [address] (the "Customer"); and

[Service provider's details] a company incorporated in [jurisdiction] under company registration number [number] and whose registered office is at [address] (the "Supplier").

EXAMPLE – *execution blocks*

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorised representatives.

For and on behalf of:

Customer

For and on behalf of:

Supplier

SIGNATURE:

NAME:

TITLE:

DATE:

SIGNATURE:

NAME:

TITLE:

DATE:

prEN 17371-2:2019 (E)**5.3 What are the services – how are they specified, ordered and what are the service performance targets?****5.3.1 Service description****5.3.1.1 General**

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. It outlines the “What” of the service contract. In service contracts developed by the contracting parties in a collaborative manner with the intent of building a positive relationship, the service buyer organization 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.

This clause provides considerations to be kept in mind while designing the service scope and description.

Consideration should also be given to where and when these services should be provided and then detailed in the service contract.

5.3.1.2 Mistaking the “How” for the “What”

A common mistake made in designing contracts is for the service buyer organization to define both the “what services are being delivered” and “how those services should be delivered” at length, including resource numbers and ratios of management to operational employees etc. In other words, after spending time, effort and resources on a sourcing process to determine the most competent service provider, the service buyer then proceeds to specify to the “expert” how to deliver the work. Many service buyers believe this gives them greater control over their supplier in the delivery of services.

This approach may in fact deliver sub-optimal results and could drive the wrong behaviour on both sides over the term of the service contract. In the first instance, by specifying “how” the work should be performed, the service provider’s innovation and enterprise that could potentially be brought to the delivery of services, is constrained. What this does over the term of the service contract is to perpetuate the old processes and performance levels obtained in the service buyer organization. If the objective of sourcing the services was to drive innovation and transformation, then this objective could be defeated.

Secondly, it could create an unintended consequence of driving behaviour contrary to the service buyers’ belief, i.e. a detailed specification of the “how” would enable service buyers to drive service provider performance to desired levels. The perverse outcome of this could be to enable the service provider avoid accountability for results. The service provider organization develops a behaviour that is focussed on just meeting contract requirements. This is particularly true where contract economics are based on a traditional headcount (principally on a time and material basis).

a) Think end-to-end processes/functions not tasks

Organizations often think of scope in terms of specific tasks to be performed. It is natural for managers to think along the lines of how they currently perform their work. However, it does not work when the service is being sourced from a service provider who will probably be working from their delivery location which may not be located near to the service buyer.

This approach can lead to fragmented scope which could result in inefficiencies and lower quality outputs through a greater number of hand-offs between the service provider and service buyer

organizations and limited scale economies. Another potential problem with this approach, is that it does not enable managers on the service buyer's side, to get a view of the end-to-end performance which is what is experienced by their customers. This could result in what is termed a "Watermelon scorecard", where the service provider performs to specified standards. The scorecard is green, but where the service buyer still experiences problems, performance is red inside.

Furthermore, inadequate design for the management of process hand-offs could lead to operational failure. Failure to identify these hand-offs and establish clear rules and protocols on how these would be managed could create service issues at a later stage. This is even more crucial in regulated industries, like financial services, healthcare etc. where there could be substantive legal and financial implications for failure.

Consequently, when designing the service scope and description, it is important to ensure an end-to-end view is taken and all process boundaries between the different organizations are carefully identified and rules and protocols for hand-offs clarified.

b) Focus on outcomes not just tasks

An important aspect to keep in mind whilst specifying and describing services to be sourced is the emphasis on the desired business outcomes expected from the service contract. Desired outcomes provide both contracting parties the bigger picture that frames the business goals to be achieved through the service contract. In its absence there is a high possibility that the contracting parties get buried in service contract minutiae whilst losing sight of the broader goals.

For each process, the organization should create a statement of outcomes aligned to the overall outcomes as outlined in the Joint Statement of Intent. The Statement of Outcomes should be clear and measurable, e.g.:

- Energy conservation efforts that reduce overall carbon footprint by XX% over the term of the service contract
- Drive cost per invoice processed to Quartile 1 levels as measured by a third-party benchmarking service
- Transformation initiatives that drive down total cost of operation by YY%
- Reduce monthly close process to 7 days.

It is quite possible that in some instances, the outcomes could be boundary-spanning and beyond the service provider's control or current scope of work. The correct way to address this is to continue to measure the overall outcome in an end-to-end manner but hold the service provider accountable to specific roles and metrics (prEN 17371-3).

c) Drive standardization/reduce heterogeneity

When similar processes/functions from multiple businesses/geographies are included, the objective should be to drive standardisation. High levels of heterogeneity create variability which drives down operational efficiency and effectiveness. Over the term of the service contract, continued heterogeneity reduces the ability of the contracting parties to innovate and transform to drive additional economic value.

d) Ensure clear allocation of work between service provider and service buyer

The next stage in the scope design process is to allocate the work between the service provider and the service buyer organizations.

1) Developing a process taxonomy