



# Procurement of services in Germany



## Art. 1 Applicability

- 1.1 These General Terms & Conditions of Purchase for the procurement of services (hereafter: "GTCP") are valid for BKW Deutschland GmbH and its subsidiaries that use these GTCP.
- 1.2 These GTCP govern the conclusion, content and performance of contracts for the provision of services in Germany, in particular in the areas of advising, planning, support and training, as well as other services that have the characteristics of a mandate and are carried out by the Agent. They supplement the contracts concluded by BKW Deutschland GmbH and form an integral component of them.
- 1.3 These GTCP only apply if the Customer is an entrepreneur (Section 14 BGB – German Civil Code), a legal entity under public law or a special fund under public law.
- 1.4 In these GTCP, the parties are referred to as "BKW" and the "Agent". The service agreement and all of its components as well as these GTCP are referred to as the "Contract".
- 1.5 Provided there is no express provision to the contrary in these GTCP, declarations and notices sent by the parties via email also meet the written requirement.
- 1.6 For orders containing elements relating to work contracts, the provisions in the appendix apply in addition to these GTCP. In the event of contradictions between these GTCP and the appendix, the provisions in the appendix take precedence of the provisions of the GTCP.

## Art. 2 Bid

- 2.1 The Agent's bid, including documentation, is submitted at no charge, provided there is no agreement to the contrary in the request for quotes.
- 2.2 The bid is binding during the period specified in the request for quotes or in the bid. If corresponding information is missing, the Agent remains bound by the bid for a period of two months from the date of the bid.

## Art. 3 Conclusion of the Contract

- 3.1 The Contract is concluded in written form and enters into force after the contractual document has been

legally signed by both parties. Amendments must be made in writing. This also applies to the amendment of this written form requirement.

- 3.2 The components of the Contract and their order of precedence are set out in the contractual document. If the Contract does not set out an order of precedence, the following order applies in the event of conflicts between the components:
  1. Contractual document
  2. Appendixes (excluding the bid and the tender)
  3. these GTCP
  4. BKW tender
  5. Agent bid
- 3.3 Only the GTCP of BKW apply. Deviating, conflicting or supplementary general terms and conditions issued by the Agent shall only be considered a component of the Contract if and to the extent that BKW expressly consents in writing to the applicability of such general terms and conditions.
- 3.4 Without a written power of attorney issued by BKW, the Agent may not enter into any obligations on behalf of BKW towards third parties.

## Art. 4 Execution

- 4.1 The Agent undertakes to execute the transactions assigned to it faithfully, professionally and carefully.
- 4.2 It warrants that all of the services it provides comply with the contractual conditions and specifications, state of the art technology and all relevant statutory requirements.
- 4.3 The Agent shall only use carefully selected and welltrained employees and shall inform BKW in writing of the names and functions of the employees it uses. In doing so, it shall in particular take note of BKW's interest in continuity. It shall only replace employees with the written consent of BKW and shall replace, within a reasonable period of time, employees who do not have the required specialist knowledge or who otherwise impair or jeopardise the performance of the contract. BKW shall handle all data confidentially, adhering to the applicable statutory data protection provisions.
- 4.4 The Agent undertakes on its behalf as well as that of its employees to adhere to the operational require-

ments of BKW, in particular its safety, working time and organisational regulations.

#### **Art. 5 Use of subcontractors**

- 5.1 The Agent must provide the service itself. It is authorised to transfer duties to a third party only with the written consent of BKW. In all cases, it remains responsible for the proper performance of the Contract.
- 5.2 In particular, the Agent shall ensure that third parties it engages comply with the obligations in Art. 5 (Use of subcontractors), item Art. 9 (Social insurance), item Art. 10 (Occupational health and safety, working conditions, wage equality of women and men), item Art. 17 (Confidentiality), item Art. 18 (Data protection) and item Art. 19 (Data protection for clients of BKW), and that BKW is able to enforce compliance with these obligations directly with the third parties that are engaged.
- 5.3 The Agent warrants that it pays its employees carrying out the agreed services a salary that does not fall below the legally required minimum salary and that this salary is subject to regular social insurance contributions. If there is concrete evidence that the Agent is not adhering to the provisions of MiLoG (German Minimum Wage Act), BKW shall be authorised to have compliance with the legal requirements reviewed by a neutral auditor at the Agent's premises, taking account of data privacy provisions.
- 5.4 If the Agent uses subcontractors to carry out the agreed services, the Agent must ensure that these subcontractors also comply with the provisions of MiLoG. The Agent must check compliance with this obligation by its subcontractors at regular intervals.
- 5.5 If claims are asserted against BKW in connection with the contracted services by the competent authorities and/or the Agent's employees or subcontractors because of failure to adhere to Section 13 MiLoG, the Agent shall indemnify and hold BKW harmless from and against all claims asserted against it upon first request.

#### **Art. 6 Changes to services**

- 6.1 The parties can mutually agree changes to services and their effects on the remuneration at any time.
- 6.2 The parties must set out changes to services in writing, either by amending the written Contract or by confirming the verbally agreed change in writing.
- 6.3 Provided there is no agreement to the contrary, the Agent shall continue to provide its services in accordance with the Contract for the duration of the negotiations concerning the change to the services.
- 6.4 If the parties are unable to agree on a change to the services, the Contract shall continue in its original state.

#### **Art. 7 Accounting**

The Agent shall inform BKW at regular intervals and upon request about the progress and the results of its work. It shall notify BKW immediately in writing of all

circumstances that impair or jeopardise the performance of the Contract.

#### **Art. 8 Collaboration of BKW**

BKW shall provide the Agent in a timely manner with all information and specifications necessary for the execution of the Contract. It shall also grant the Agent the necessary access to its premises and, if necessary, provide it with the required systems and tools. Any additional collaboration obligations on the part of BKW shall be set out in writing in the Contract.

#### **Art. 9 Social insurance**

- 9.1 If the Agent is a legal entity, it shall, as an independent company, carry out the necessary registrations at the social insurance office for itself and its employees. If it is not a legal entity, it must demonstrate that it is affiliated with a compensation fund as a self-employed person.
- 9.2 BKW shall not pay any social contributions (AHV, IV, ALV, etc.) or make any other compensation payments, particularly in the event of accident, illness, disability or death, or occupational pension contributions. If the social insurance authorities do not recognise the self-employment status of the Agent, BKW may claim back any employer contributions or offset them against the Agent's fee.

#### **Art. 10 Occupational health and safety, working conditions, wage equality of women and men**

Agents who maintain a head office or a branch in Germany must comply with the occupational health and safety regulations that apply in Germany and ensure the equal treatment of women and men in respect of compensation equality. Agents who maintain a head office abroad must comply with the corresponding provisions that apply in the place where the service is provided.

#### **Art. 11 Place of performance**

BKW defines the place of performance in the Contract. If nothing is defined, then the place where BKW has its head office in Germany shall be the place of performance.

#### **Art. 12 Default**

- 12.1 If the Agent does not meet binding agreed deadlines, it shall immediately be in default; in all other cases, this shall be the case if the Agent has received a reminder notice.
- 12.2 If the Agent is in default, it shall owe a contractual penalty if it cannot prove that it is not responsible for the delay. The contractual penalty shall be 0.3% for each day of the delay, up to a maximum of 5% of the total remuneration. This penalty shall also be due if the services are accepted by BKW after the agreed deadline.
- 12.3 All other rights in accordance with statutory provisions remain unaffected.

**Art. 13 Liability**

- 13.1 The Agent shall indemnify BKW upon first request from all liability against third parties and from third-party claims in connection with the agreed services, the work results or the use of these work results. The obligation to indemnify shall not apply if the claim is based on a grossly negligent or intentional breach of a duty on the part of the Customer.
- 13.2 To the same extent, the Agent shall be liable for the conduct of its subcontractors, suppliers and agents, in the same way as for its own conduct.

**Art. 14 Force majeure**

The parties shall not be held liable for the late, improper or non-performance of their obligations under the Contract if such late, improper or non-performance is due to events for which the parties are not responsible or force majeure events, and the affected party reports this immediately and takes all reasonable steps to perform the Contract.

**Art. 15 Remuneration and payment terms**

- 15.1 The Agent shall provide the services at fixed prices or on a time and material basis with an upper limit on the remuneration (cost cap). In its bid, it shall provide the cost types and cost rates.
- 15.2 Upon payment of the remuneration, all contractually agreed services shall be deemed compensated. In particular, the compensation covers the transfer of rights, all documentation and material costs as well as expenses and public levies, such as taxes and customs duties.
- 15.3 The services shall be invoiced after all the services have been fully provided. If prepayments, advance payments or instalment payments are agreed in the Contract, BKW may request that the Agent provide security in the form of a first-class bank or insurance guarantee. The value added tax must be shown separately on the invoice.
- 15.4 Invoices are due for payment 30 days after receipt. The statutory default interest shall be due in the event of late payment.
- 15.5 If the Agent grants discounts on its services and if several BKW companies utilise the Agent's services, the prices for all of the services utilised by the companies of the BKW Group shall be used for calculating discounts.

**Art. 16 Property rights and licences**

- 16.1 Work results and all property rights (intangible and ancillary copyrights as well as the entitlement to such rights) and ownership rights to the work results created in the framework of the performance of the Contract shall accrue in full to BKW. The Agent hereby transfers to BKW all intangible rights to the work results; BKW accepts the transfer. If the transfer of the rights to the work results is not possible, in particular in the case of copyrights, the Agent shall grant BKW an exclusive licence to use them.

16.2 If existing copyrights held by the Agent or a third party engaged by it are required for the use and exploitation of the work results, the Agent shall grant BKW a non-terminable, sub-licensable right to use the work results without restriction as regards time, place or objective and/or it shall ensure that it receives such a right from the third party it has engaged.

16.3 The Agent warrants that no third-party property rights have been breached in connection with the provision of the service or the work results that are created. It shall warrant the lawfulness and legal validity of the transfer of property rights and the granting of licences to BKW in accordance with these GTCP and the Contract.

16.4 The Agent shall defend third-party claims for the breach of property rights immediately and at its own expense. It shall inform BKW of such claims in writing immediately. BKW shall be entitled to join court proceedings at any time. If the third party asserts claims directly against BKW, the Agent shall, upon first request, indemnify and hold BKW harmless from all claims that have been asserted. Upon request, the Agent shall assist BKW with any court proceedings.

16.5 If BKW is prohibited from using or is unable to use the contractually agreed services in full or in part because of property rights that have been asserted, the Agent must either modify its services so that they no longer breach the rights of third parties and still comply with the required scope of services, or obtain a licence from the third party at its own expense. If the Agent does not avail itself of these options within a reasonable period of time, BKW can withdraw from the Contract with immediate effect. Irrespective of who is at fault, the Agent must hold BKW completely harmless at all times.

**Art. 17 Confidentiality**

17.1 Without the prior written consent of BKW, confidential information and documents connected with this Contract or obtained in the course of providing the services requested by BKW or by third parties must not be disclosed to third parties or used for purposes other than the provision of the services in accordance with this Contract.

17.2 The duty of confidentiality continues after the end of this contract. The duty of confidentiality shall only end when and if the confidential information disclosed to the other party has become generally known.

17.3 If the Agent wants to advertise the contractual relationship, wishes to disclose it in some other manner or would like to use BKW as a reference, the prior written permission of BKW is required.

17.4 The documents and data provided to the Agent remain the exclusive property of BKW. This applies in particular for any copyrights to the documents provided. Copies are only permitted if this is agreed in the Contract or if this is necessary for the fulfilment

of the contractually agreed tasks and work. The documents and data related to the order must be returned or destroyed immediately at the request of BKW; data saved on the Agent's computers must be deleted. Statutory retention obligations and electronic backup copies on backup servers remain reserved.

- 17.5 The Agent undertakes to ensure that the obligations arising from this item Art. 17 are observed by its employees as well as any other third parties engaged in the performance of the Contract.
- 17.6 If the Agent breaches the above confidentiality obligations, it shall owe BKW a contractual penalty if it cannot prove that it is not responsible for the breach. This penalty shall be 5% of the total remuneration for each breach, not to exceed EUR 50,000.00 per case. The payment of the contractual penalty does not release the Agent from complying with the confidentiality obligations. The contractual penalty must be paid in addition to any compensation for damages.

#### **Art. 18 Data protection**

- 18.1 The Agent acknowledges and accepts that BKW collects data about it that is required for the implementation of the mandate, the review of the service and a comparison of services with third parties. BKW shall be entitled to involve third parties for this purpose and, in the course of doing so, to make the data available to these third parties solely for the aforementioned purpose. Any third parties shall be contractually obligated to maintain confidentiality.
- 18.2 The Agent acknowledges and accepts that data may also be transmitted outside Switzerland for this purpose, although the applicable data protection regulations will always be observed.

#### **Art. 19 Data protection for clients of BKW**

If the Agent receives access to information BKW has about the clients for the purpose of performing the Contract, it undertakes to comply with the following provisions:

- a. The client data collected by the Agent in the course of carrying out the order or provided to it by BKW may only be used for the purposes specified in the Contract, and no personal information must be shared without the written consent of BKW and the affected client. BKW is entitled to impose additional restrictions; for example, it may indicate that data may be used only in anonymised form.
- b. The Agent shall take all appropriate technical and organisational security measures to ensure that personal data is protected against accidental or intentional manipulation, loss, destruction or access by unauthorised parties. In particular, the data provided by BKW to the Agent shall have appropriate access protection (such as password protection) to ensure that only authorised persons may view and use the data. The personal data collected must be permanently deleted after the end of the order.

#### **Art. 20 Assignment and pledge**

The Agent may not assign or pledge claims against BKW without the written consent of BKW.

#### **Art. 21 Applicable law and place of jurisdiction**

German law applies, to the exclusion of the United Nations Convention of 11 April 1980 on the Contracts for the International Sale of Goods (Vienna Sales Convention). In the event of disputes in connection with the Contract, Berlin is the exclusive place jurisdiction.

## Appendix:

### Additional provisions for orders containing elements relating to work contracts

#### 1 Transfer of risk

- 1.1 The Agent shall bear the full risk for the entire work until it is accepted.

#### 2 Acceptance

- 2.1 The parties shall keep and sign reports and, if necessary, other documents concerning the acceptance. If contractually agreed, the parties shall carry out the acceptance together.
- 2.2 The Agent shall notify BKW in a timely manner that the agreed services are ready.
- 2.3 BKW shall inspect the services as soon as possible within the context of the normal course of business. It shall notify the Agent of any defects and set an appropriate deadline for remedying these defects. Another review is carried out at the end of this deadline. If no defects are identified, the acceptance is deemed completed. The delivery costs and expenses incurred by BKW as a result of repeating the test shall be borne by the Agent.
- 2.4 Tacit approval of the services is excluded.

#### 3 Warranty

- 3.1 The Agent warrants that its services have the agreed and promised features as well as the characteristics for the intended use that BKW can expect even without a separate agreement. The warranty provided by it will remain valid for two years from acceptance of the fully rendered contractual services. The deadline begins on the day after BKW signs the acceptance certificate.
- 3.2 BKW can report defects in writing at any time during the warranty period. All notices of defects submitted during the notification period are considered timely.

Even after the expiry of the warranty period, the Agent is obliged to satisfy claims resulting from the rights of BKW described below, provided that the defects were reported during the warranty period.

- 3.3 In the event of a defect, BKW shall have recourse to the statutory warranty rights, provided there is no provision to the contrary below.
- 3.4 If the Supplier does not meet its obligation to take remedial action – by, at the Customer's discretion, correcting the defect (repair) or providing a defect-free delivery (replacement delivery) – within a reasonable period of time specified by the Customer, BKW may correct the defect itself and demand reimbursement from the Supplier for the necessary expenditures or a corresponding advance payment. Without prejudice to Section 635(3) of BGB, the Supplier may refuse to carry out the remedial action chosen by the Customer if producing the work again rather than repairing it is out of proportion to the reported defect. In addition, according to the statutory provisions, the Customer is entitled to reduce the agreed price or to withdraw from the Contract. Furthermore, in accordance with the statutory provisions, the Customer is also entitled to claim compensation for damages and expenses.
- 3.5 Until the defect is remedied or it withdraws from the Contract, BKW shall continue to be able to dispose of any work results or parts thereof that are the subject of a complaint. Operation of the defective work result can continue provisionally if this is agreed mutually between the parties.
- 3.6 The warranty shall restart for replacement deliveries and any component affected by repair.

#### 4 Prices

The fixed price defined in Article 15.1 does not affect an adjustment of the remuneration for elements relating to service contracts in accordance with Sections 650(b) and (c) BGB.