

VOB/B

Construction Procurement Contract Regulations – Part B

Terms & Conditions for the Execution of Construction Work

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Content

§ 1 Nature and scope of performance.....	2
§ 2 Fees	2
§ 3 Work execution documents.....	4
§ 4 Work execution	5
§ 5 Work execution deadlines	7
§ 6 Work impediments and stoppages	7
§ 7 Bearing of risks	8
§ 8 Termination by the Procurer.....	8
§ 8 Termination by the Contractor.....	8
§ 10 Liability of the contracting parties	10
§ 11 Contractual penalties	11
§ 12 Acceptance	11
§ 13 Defect claims	12
§ 14 Billing, settlement of accounts.....	14
§ 15 Work billable by the hour.....	14
§ 16 Payment	15
§ 17 Surety	17
§ 18 Disputes.....	18

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§ 1

Nature and scope of performance

- (1) The nature and scope of work to be performed is regulated by the contract. The General Technical Terms for Construction Contracts (VOB/C) additionally apply as an integral part of the contract.
- (2) In case of conflicting contractual provisions, the following shall govern in order of precedence:
 1. the performance description
 2. the Special Contractual Terms
 3. any Supplemental Terms & Conditions
 4. any Supplemental Technical Terms & Conditions
 5. the General Technical Terms for Construction Contracts
 6. the General Terms & Conditions for the Execution of Construction Work.
- (3) The Procurer reserves the right to order changes to the construction plan.
- (4) If work becomes necessary for execution in performance of contract which has not been agreed, upon request by the Procurer the Contractor shall perform such work unless the Contractor's firm is not suitably organized to perform such work. Other requested work/services are subject to acceptance by the Contractor.

§ 2

Fees

- (1) Payment of the stated contractual prices settles all claims for work/services due in performance of contract pursuant to the performance description, the Special Terms of Contract, the Supplemental Terms & Conditions, the Supplemental Technical Terms & Conditions, the General Technical Terms & Conditions for Construction Work and established trade practices.
- (2) Fees are billable applying the contractual unit prices for work actually performed, unless other fee arrangements (such as flat fee, at hourly rates or at cost) have been agreed.
- (3)
 1. If the quantity of executed work or performance elements for which a unit price applies differs from the quantity stated in the contract by less than ten percent, the contractual unit price shall still apply.
 2. If the ten percent quantity threshold is exceeded, upon request a price adjustment shall be agreed which is appropriate in view of the additional cost or cost savings resulting.
 3. When the stated quantity is exceeded by more than 10 percent, upon request the unit price is to be increased for the quantity of work or performance elements actually executed unless the Contractor is otherwise compensated via an increase in quantities for other item numbers (positions) or by other means. The unit price increase should essentially correspond to the increased amount calculated by dividing the construction site setup and overhead costs plus general business costs by the decreased quantity.

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Sales tax shall be payable on the adjusted price.

4. If the performance of other work is contingent upon work or performance elements falling within the scope of a unit price, payment for which is included in a contractual flat fee, an appropriate adjustment of the flat fee may be demanded in case of a unit price change.

- (4) If the Procurer opts for self-performance of work/services deselected in the contract (such as the provision of construction, construction-related or operational materials, § 8 paragraph 1 point 2 shall apply accordingly.
- (5) If a change in the construction plan or other matters ordered by the Procurer result in a change in the price basis for the contractual work/services, an adjusted price must be agreed in line with the additional or reduced cost thereby resulting. This is to be agreed prior to execution.
- (6)
 - 1. The Contractor shall be entitled to separate compensation for any work/services required which are not provided for in the contract. The Contractor must however notify the Procurer of entitlement to such compensation before commencing execution of the work/services.
 - 2. The amount of such compensation shall be determined applying the bases for price calculation for the contractual work/services and the specific costs for the work/services required. This amount is to be agreed prior to the commencement of execution.
- (7)
 - 1. If a flat fee is agreed as payment for the work/services, this fee amount shall remain unchanged. If the executed work/services substantially differ from the contractual provided work/services to an extent rendering it unreasonable to leave the flat fee unadjusted (§ 313 of German Civil Code/BGB), upon demand a compensation amount shall be granted in line with the additional or reduced cost. The bases for price calculation shall be applied for determining the compensation amount.
 - 2. The provisions per paragraphs 4, 5 and 6 shall also apply if a flat fee is agreed.
 - 3. Except as otherwise agreed, points 1 and 2 shall also apply for flat fee amounts agreed for partial performance elements. Paragraph 3 point 4 remains unaffected.
- (8)
 - 1. Work/services executed in a manner deviating from the contract without corresponding instruction to do so shall not be compensated. Upon demand the Contractor shall remove/reverse such within an appropriate period of time, otherwise this may be done at the Contractor's expense. The Contractor shall furthermore be liable for other damages thereby suffered by the Procurer.
 - 2. The Contractor shall only be entitled to compensation however only if the Procurer accepts the work/services in question after the fact. The Contractor shall furthermore be entitled to compensation if the work/services were necessary for contract fulfillment and expectably wanted by the Procurer and the Procurer was notified thereof without delay. The calculation bases for changed or additional work/services per paragraphs 5 or 6 apply mutatis mutandis shall apply if the Contractor is entitled to compensation.
 - 3. The German Civil Code provisions regulating implied fiduciary obligation (§§ 677 ff. BGB) remain unaffected.

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- (9) 1. If the Procurer requires drawings, calculations or other documents which the Contractor is not contractually responsible for providing, including particularly under the Technical Terms or as a matter of established trade practice, the Procurer must pay compensation for such.
2. The Procurer shall bear any costs connected with having the Contractor review technical calculations which were not prepared by the Contractor.
- (10) Work billable by the hour shall only be compensated if and as expressly agreed in advance of the performance thereof (§ 15).

§ 3

Work execution documents

- (1) Documents necessary for work execution must be promptly provided to the Contractor free of charge.
- (2) The Procurer is responsible for staking out the major axes of the construction site and works and of the borders of the construction site made accessible to the Contractor and for creating the necessary vertical datum points in the immediate vicinity of the construction site and works.
- (3) The site photographs provided by the Procurer, the stakes laid and other documents handed over for the purpose of work execution are binding reference sources for the Contractor. The Contractor shall however review these to identify any discrepancies, to the extent called for as part of proper contract fulfillment, and to notify the Procurer accordingly of any suspected or identified deficiencies.
- (4) Prior to work commencement, the condition of roads, of the site terrain, of drainage channels and pipes and of structures located within the construction area must be recorded in a document for the Procurer and Contractor to acknowledge.
- (5) Drawings, calculations, calculation verifications and other documents which the Contractor is contractually required to provide, including particularly under the Technical Terms, as a matter of established trade practice or as specially required by the Procurer (§ 2 paragraph 9), must be submitted promptly to the Procurer when requested.
- (6) 1. The documents referred to under paragraph 5 may not be made public, reproduced, changed or used for any purpose other than as agreed without the permission of the respective author.
2. The Procurer is entitled to use data processing software exhibiting the contractual agreed performance characteristics in unchanged form on the specified devices. The Procurer is permitted to make two copies thereof for data backup purposes. These must support all identification credentials. Documentation of the location where the copies are kept must be provided upon request.
3. The Contractor remains entitled to use the documents and software irrespective of the Procurer's right of use.

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§ 4 Work execution

- (1)
 1. The Procurer is responsible for maintaining general order at the construction site and coordinating the work/deployments of the various contractor firms involved. The Procurer is responsible for obtaining all necessary official permits and licenses required under construction, traffic, water or commercial code.
 2. The Procurer is entitled to monitor work execution to verify contractual conformity. Accordingly, the Procurer shall have access to workplaces, workshops and storage rooms where the contractual construction work or parts thereof are built and/or materials and elements intended for the construction work are stored. Upon request, drawings of the work, other work execution documents and/or quality inspection findings are to be presented to the Procurer for review and any necessary information provided to the extent doing so is possible without disclosing business secrets. Information and documents designated as business secrets must be treated confidentially.
 3. Respecting the Contractor's supervisory entitlement (paragraph 2), the Procurer is empowered to order measures which are necessary for execution of the work in conformance with contract. Such orders shall be issued exclusively to the Contractor or the Contractor's representative appointed to supervise work execution except in urgent cases of *periculum in mora*. The Procurer must be informed of the individuals respectively appointed as the Contractor's representative for supervising work execution.
 4. If the Contractor deems orders given by the Procurer to be unjustified or inexpedient, the Contractor shall communicate such concerns but still carry out the orders in question upon demand unless barred from doing so by law or official regulation. The Procurer shall bear additional costs accruing through any unnecessary complications resulting.
- (2)
 1. The Contractor shall perform the work under his own supervision in accordance with the contract, observing recognized technical principles and in compliance with laws and regulations. The Contractor is responsible for supervising execution of the contractual work and maintaining order at the work site.
 2. The Contractor shall be solely responsible for compliance with laws and regulations pertaining to the Contractor's employees, and for the fulfillment of employer liability association obligations. The Contractor is solely responsible for implementing agreements and measures regulating the Contractor's relationship to employees.
- (3) If the Contractor has concerns regarding the planned work execution approach (including with regard to accident prevention), the quality of materials or construction elements supplied by the Procurer or the performance of other contractors, the Contractor shall promptly notify the Procurer in writing, before commencing work if possible, but the Procurer shall remain responsible for information provided, orders given and deliveries made by the Procurer.
- (4) Except as otherwise agreed, the Procurer must make the following available to the Contractor free of charge for exclusive or shared use:
 1. necessary storage and work areas at the construction site
 2. existing access routes and rail sidings
 3. existing water and power connections. The Contractor bears consumption

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costs and the cost of meters or other measuring equipment on a corresponding percentage basis factoring in usage by any other contractors.

- (5) The Contractor shall protect elements constructed by the Contractor and property items handed over to the Contractor for work execution against damage and theft during the period up until acceptance. Upon request by the Procurer, the Contractor shall ensure protection against winter damage and groundwater effects, removing snow and ice. Compensation for the above shall be as regulated under § 2 paragraph 6 if the obligation per sentence 2 is not contractually established.
- (6) Materials and construction elements which are non-conforming with either the contract or with the samples shall be removed from the construction site within a period specified by the Procurer. If not removed within such period, these may be removed at the Contractor's expense or sold on the Contractor's behalf.
- (7) The Contractor shall replace any constructed works which during their execution are recognized as defective or non-contractually conforming with non-defective works at the Contractor's own expense. If responsible for the defect or contractual non-conformity the Contractor must furthermore pay compensation for resulting damages. For failure to meet defect remedying obligations the Procurer may set an appropriate deadline for the Contractor to remedy the defect/s in question, providing notification that the contract will be terminated if the grace period deadline is not met (§ 8 paragraph 3).
- (8)
 - 1. Work execution shall be conducted by internal personnel within the Contractor's own business organization. The Contractor may outsource work to subcontractors with the Procurer's written consent. Consent is not necessary for work which the Contractor's organization is not set up to provide. If the Contractor performs work non-internally without the Procurer's written consent although the Contractor's organization is set up to perform such work, the Procurer may set a reasonable deadline for commencing direct performance of the work internally, providing notification that the contract will be terminated if this deadline is not met (§ 8 paragraph 3).
 - 2. The Contractor must ensure that any construction work outsourced to subcontractors is governed by Parts B and C of the Construction Procurement Contract Regulations.
 - 3. The Contractor shall notify the Procurer of any subcontractors and of their subcontractors in turn no later than the point of work commencement by the subcontractor/s in question, stating the company name/s and the names of the statutory company representatives along with the relevant contact data. Upon demand by the Procurer, the Contractor shall provide information on and document the suitability of subcontractors.
- (9) The Contractor shall notify the Procurer of any finds of objects of archaeological significance or artistic or scientific value discovered on the property during work execution before undertaking any further discovery or further altering the site and deliver said objects to the Procurer upon receiving specific instruction. Compensation for any additional cost accruing is regulated under § 2 paragraph 6. Finder's rights accrue to the Procurer (§ 984 of BGB).

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- (10) Works which will no longer be inspectable to determine their condition at a later point due to subsequent construction as part of the overall project shall be jointly inspected by the Procurer and Contractor to establish their condition. The inspection findings are to be documented in writing.

§ 5

Work execution deadlines

- (1) Work is to commence, proceed appropriately and be completed in accordance with the binding schedule (contractual period/deadlines). Specific deadlines stated as part of a construction project timeline shall only constitute contractual deadlines if and as expressly agreed in the contract.
- (2) If a work commencement deadline has not been agreed, the Procurer shall provide the Contractor information upon request concerning the planned start date. The Contractor shall commence work within 12 business days of being requested to do so. The Procurer must be informed of the commencement of work execution.
- (3) The Contractor must remedy the situation immediately upon demand if the manpower, equipment, scaffolding, materials or construction elements on hand are insufficient to allow meeting work execution deadlines.
- (4) If the Contractor is delayed in commencing work, is late in completing work or fails to meet the obligation per paragraph 3, the Procurer may claim damages in accordance with § 6 paragraph 6 without affecting the contract or set a reasonable grace period for the Contractor to fulfill the contract, declaring that the contract will be terminated if the deadline elapses unfulfilled (§ 8 paragraph 3).

§ 6

Work impediments and stoppages

- (1) The Contractor must notify the Procurer immediately in writing if the Contractor believes that circumstances are in evidence which impede proper work execution. If the Contractor fails to provide such notification, the Contractor shall only be entitled to have such impeding circumstances taken into account if their existence and their impeding effect were obviously known to the Procurer.
- (2)
 1. Execution deadlines shall be extended if a work impediment is caused by/results from:
 - a) circumstances falling within the Procurer's sphere of risk
 - b) a strike or a lockout in the Contractor's organization or a company working directly for the Contractor ordered by the employers' representative of the interest group for the profession
 - c) force majeure or other circumstances unavoidable by the Contractor.
 2. Weather effects occurring during the work execution period which would have been normally expectable at the time of offer submission shall not be deemed an impediment.

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- (3) The Contractor shall do everything reasonably possible to ensure that work can continue. The Contractor must immediately resume work without delay, notifying the Procurer accordingly, as soon as the impeding factors are no longer in evidence.
- (4) The deadline is to be extended by the duration of the impeding circumstances, adding extra time accordingly for work resumption and taking into account postponement into a less favorable season of the year, as applicable.
- (5) If work execution is expected to be interrupted for an extended period of time but not be permanently impossible, the work completed is invoiceable applying the contractual prices/rates and costs are billable which the Contractor has already incurred which are not factored into the contractual prices/rates for the uncompleted portion of the work.
- (6) If impeding circumstances are the fault of one of the contracting parties, the respective counterparty shall be entitled to claim compensation for damages demonstrably incurred. Lost profits may only be claimed in cases of intent or gross negligence. The Contractor's claim to adequate compensation in accordance with § 642 BGB shall furthermore remain unaffected if notification per paragraph 1 sentence 1 is given or if the circumstances were obvious as per paragraph 1 sentence 2.
- (7) Either party may terminate the contract in writing once work has been interrupted for a period exceeding three (3) months' duration. Billing is subject to paragraphs 5 and 6. If the Contractor is not responsible for the interruption, costs for clearing the construction site shall also be reimbursable unless included in the fees for work already performed.

§ 7

Bearing of risks

- (1) If prior to acceptance an executed work is damaged or destroyed, wholly or in part, through force majeure, war, unrest or other objectively unavoidable circumstances for which the Contractor is not responsible, the Contractor shall have claims for the portions of work per § 6 paragraph 5. For other damage, no mutual compensation obligations shall apply.
- (2) A completed or partially completed work shall include by definition all work performed on the construction work which is directly connected or pertains to its structure, irrespective of the degree of completion thereof.
- (3) A fully or partially completed work does not include materials or construction elements not yet installed, nor the setup or stakeout of the construction site. Auxiliary structures and scaffolding likewise do not constitute a completed or partially completed work, even if these represent a special service or have been separately contracted.

§ 8

Termination by the Procurer

- (1) 1. The Procurer may terminate the contract at any time up until the point of work completion.

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2. The Contractor is entitled to the contractual fees. Costs saved by the Contractor due to termination of the contract shall however be deductible therefrom as well as revenue amounts earned from the resulting redeployment of the Contractor's work and operational capacity, and such revenue not earned through malicious omission (§ 649 BGB).
- (2) 1. The Procurer may terminate the contract if the Contractor ceases making payments, if insolvency proceedings (§ 14 and 15 of the Insolvency Regulation/InsO) or a comparable legal procedure has been permissibly filed for by the Procurer or another creditor, if such a procedure has been opened or if the opening of such a procedure is rejected due to insufficient assets.
2. Work executed is billable in accordance with § 6 paragraph 5. For the remaining work, the Procurer may claim damages for non-fulfillment.
- (3) 1. In the cases per § 4 paragraph 7 and 8 point 1 or § 5 paragraph 4, the Procurer may terminate the contract if the grace period set has elapsed unfulfilled. Termination may be limited in scope to a specific portion of the contractual work.
2. Upon termination the Procurer is entitled to have the portion of work not yet completed performed by a third party at the Contractor's expense without affecting claims potentially accruing to the Procurer for further damages. The Procurer is furthermore entitled to refuse further work execution and claim damages for non-fulfillment if execution of the work is no longer of interest due to the reasons which led to termination.
3. In order to continue work the Procurer may make use of equipment, scaffolding and/or other equipment available on the construction site as well as supplied materials and construction elements in return for reasonable compensation.
4. The Procurer shall send the Contractor a statement of additional costs incurred and of any other claims asserted within twelve (12) business days of billing by said third party.
- (4) The Procurer may terminate the contract
1. if the Contractor has entered into an arrangement in connection with procurement contract awarding that constitutes an illegal competition restraint. Paragraph 3 point 1 sentence 2 and points 2 - 4 shall apply mutatis mutandis.
2. if the contract was concluded within the scope of application of Part 4 of the Competition Restraints Determent Act (GWB)
- a) if the Contractor should not have been awarded the contract due to a compelling reason for exclusion being in evidence at the time of awarding. Paragraph 3 point 1 sentence 2 and points 2 - 4 shall apply mutatis mutandis.
- b) in case of significant amendment of the contract, or if the European Court of Justice finds that the contracts are in serious breach of the Treaties on the European Union and of the Functioning of the European Union. Work executed is billable in accordance with § 6 paragraph 5. Any damage claims accruing to the parties shall remain unaffected.
- Notice of termination must be given within 12 business days of becoming aware of the grounds for termination.

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- (5) If the Contractor has subcontracted some or all of the work, irrespective of the scope of Part 4 GWB the Contractor shall likewise have rights of termination as per paragraph 4 point 2 letter b if the contract under which the Contractor is obligated as contractor (main contract) is terminated in accordance with paragraph 4 point 2 letter b. The same shall apply to every outsourcer within the subcontractor chain in the event the outsourcer of that respective outsourcer in turn terminates the contract in accordance with sentence 1.
- (6) Termination notice must be given in writing.
- (7) Immediately upon termination the Contractor may demand measurement and acceptance of the Contractor's executed work, for which the Contractor must submit a verifiable invoice for the executed work without delay.
- (8) A contractual penalty owed due to a delay, the amount of which is measured based on the period of time involved, may only be claimed for the period up until the date of termination of the contract.

§ 9

Termination by the Contractor

- (1) The Contractor may terminate the contract:
 - 1. if by failing to perform an action in fulfillment of an obligation the Procurer renders the Contractor unable to execute the work (delayed acceptance per §§ 293 ff. BGB)
 - 2. if the Procurer fails to make payment when due or is otherwise in default.
- (2) Termination notice must be given in writing. Termination is only permissible if the Contractor declares intent to terminate the contract, setting a reasonable deadline for the Procurer to fulfill the contract which is subsequently not met.
- (3) Work performed up to that point shall be billable applying the contractual rates/prices. The Contractor is furthermore entitled to appropriate compensation in accordance with § 642 BGB, and any further claims accruing to the Contractor remain unaffected.

§ 10

Liability of the contracting parties

- (1) The contracting parties are liable to each other for actions and omissions on their own part and on that of their statutory corporate representatives and agents utilized for the fulfillment of their obligations (§ 276, § 278 BGB).
- (2)
 - 1. If both contracting parties have statutory liability for damages accruing to a third party in connection with the work, the general statutory provisions shall govern the sharing of damages between the contracting parties, except as otherwise agreed in a specific case. If damages accruing to a third party are due exclusively to a measure which was ordered by the Procurer and executed accordingly, the Procurer shall exclusively bear the cost for damages if the Contractor has informed the Procurer of the risk connected with the ordered work in accordance with § 4 paragraph 3.
 - 2. The Contractor shall exclusively bear the cost if the damages are covered under a policy insuring the Contractor's statutory liability, or if such insurance

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could have covered the damages under a policy with an insurer licensed to operate in Germany which is available at regular premium rates and with regular premium surcharges, covering non-exceptional circumstances.

- (3) If the Contractor is obligated to pay damages to a third party pursuant to §§ 823 ff. BGB due to unauthorized physical entry, for damage to adjacent properties, due to the removal or storage of soil or other property outside of the areas specified for such by the Procurer, or due to consequences of blocking of paths or watercourses without instruction to do so, the Contractor shall exclusively bear costs for the damage rather than sharing costs with the Procurer.
- (4) In the relationship between the contracting parties, the Contractor shall be solely liable for the infringement of industrial property rights if the Contractor himself offered the protected method or the use of protected property items, or if the Procurer required usage thereof while advising of the relevant property rights.
- (5) If one contracting party is exempt from obligation to compensate the respective counterparty under paragraphs 2, 3 or 4, such exemption shall apply likewise to that party's statutory corporate representatives and vicarious agents, except if such have acted with intent or gross negligence.
- (6) If one contracting party is sued by the third party for damages which the other contracting party has to bear pursuant to paragraphs 2, 3 or 4, said party may demand indemnification by the respective contracting party for and from liability vis-a-vis the third party. The contracting party may not in such case recognize or settle the third party's claim without first giving the other contracting party opportunity to make a statement.

§ 11

Contractual penalties

- (1) If contractual penalties are agreed, §§ 339 - 345 of BGB shall apply.
- (2) If a contractual penalty has been agreed for the event that the Contractor fails to meet a deadline, such penalty shall be due if and when the Contractor is in delay of performance.
- (3) If the contractual penalty amount is calculated based on the number of days, only business days are counted, and if based on the number of weeks, every business day of a week started counts as 1/6 of a week.
- (4) If the Procurer has accepted the work, the Procurer may only claim a penalty if the Procurer reserved the right to do so at the time of acceptance.

§ 12

Acceptance

- (1) If the Contractor demands acceptance of the work after its completion — potentially ahead of the contractual work execution deadline — the Procurer must conduct acceptance within 12 business days unless a differing deadline is agreed.
- (2) A special acceptance procedure shall be conducted for specific, discrete work elements if requested.

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- (3) The conducting of acceptance may be refused until any significant defects in evidence have been remedied.
- (4)
 - 1. A formal acceptance procedure must be conducted if requested by one contracting party. Both parties may summon an independent expert at their own respective expense. The expert's findings must be documented in writing as part of a negotiation between the parties. Any reservations regarding known defects and contractual penalties are to be noted in the report as well as any objections raised by the Contractor. Each party shall receive one copy.
 - 2. A formal acceptance procedure may be conducted without the Contractor being present as long as the date was agreed or the Procurer provided sufficient advance notice. The Contractor must then be promptly informed of the outcome of the acceptance procedure.
- (5)
 - 1. If an acceptance procedure has not been requested, work shall be deemed accepted after a period of twelve (12) business days from the date of written notification of completion of the work.
 - 2. If an acceptance procedure is not requested and the Procurer has made use of the work as a whole or in part, acceptance shall be deemed given after a period of six (6) business days from the date of commencement of such usage, except as otherwise agreed. Acceptance shall not be deemed given for usage of elements of a constructed work in order to complete further work.
 - 3. The Procurer must assert any reservations for known defects or due to contractual penalties by no later than the points in time specified under points 1 and 2.
- (6) Risk passes to the Procurer upon acceptance unless the Procurer already bears risk pursuant to § 7.

§ 13 **Defect claims**

- (1) At the time of acceptance the Contractor must provide the completed work to the Procurer in a condition free of physical defects. The completed work shall be deemed free of physical defects at the time of acceptance if the work exhibits the contractual qualities/features and conforms with recognized technical principles. If qualities/features have not been agreed, the completed work shall be deemed free of physical defects at the time of acceptance
 - 1. if the completed work is suitable for usage as contractually required and
 - 2. for regular usages otherwise and exhibits characteristics/features which are typical for that type of constructed work and which the Procurer can expect to be in evidence based on the nature of the work.
- (2) If samples are taken to establish whether contractual characteristics are in evidence, the characteristics of the sample taken shall be deemed contractually conforming if any detected discrepancies count as insignificant in common practice. This shall also apply regarding samples which are only recognized as such after contract conclusion.
- (3) If a defect results from the performance description or from instructions issued by the Procurer, from materials or construction elements supplied or required

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by the Procurer or from the characteristics of upstream work performed by another contractor, the Contractor shall have liability unless the Contractor has provided notification as obligated under § 4 paragraph 3.

- (4)
 1. If an expiration of claims period for defect claims has not been agreed in the contract, the period shall be four (4) years for buildings, two (2) years for other work which is deemed as successful based on the building, maintenance or alteration of an item, and two (2) years for combustion system elements with fire contact. Superseding sentence 1, the expiration of claims period for elements with fire contact and exhaust gas-insulating elements of industrial combustion systems shall be one (1) year.
 2. Except as otherwise agreed for parts of mechanical or electrotechnical/electronic systems, the maintenance of which affects safety and functionality, superseding point 1, the expiration of claims period for defects to those system parts shall be two years if the Procurer opts not to hire the Contractor to perform maintenance for the duration of the expiration of claims period. This shall also apply if a differing expiration of claims period has been agreed for other work.
 3. The period shall begin upon acceptance of the overall work project. For specific, discrete work project elements, this period shall begin upon partial acceptance (§ 12 paragraph 2).
- (5)
 1. The Contractor is obligated to remedy at his own expense any defects emerging during the expiration of claims period which are attributable to non-contractually conforming work if the Procurer requests such in writing prior to elapse of said period. The claim to remedying of reported defects shall expire in a period of two (2) years from the date of receipt of written request thereof, but not prior to elapse of the standard periods per paragraph 4 or a superseding period agreed. Upon acceptance of work to remedy a defect, a two-year expiration of claims period shall begin anew for that work which shall not expire before elapse of the standard periods per paragraph 4 or of a superseding period agreed.
 2. If the Contractor fails to fulfill the demand to remedy a defect within a reasonable period set by the Procurer, the Procurer may have that defect remedied at the Contractor's expense.
- (6) If remedying of a defect is unreasonable for the Procurer, is impossible or would require disproportionate effort, for which reason the Contractor refuses to do so, the Procurer may reduce the fee, notifying the Contractor accordingly (§ 638 BGB).
- (7)
 1. The Contractor has liability for damages in connection with loss of life and bodily injury/harm resulting from culpably caused defects.
 2. The Contractor is liable for any damages resulting from defects caused intentionally or through gross negligence.
 3. The Procurer shall furthermore be compensated for damage to the constructed work for which work is performed to build, maintain or modify if a significant defect is in evidence that significantly impairs usability and is the fault of the Contractor. The Contractor shall only be liable for any further damages if

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- a) the defect results from a violation of recognized technical principles
 - b) the defect concerns a contractually agreed quality/feature which is not in evidence, or
 - c) if the Contractor holds a policy insuring the Contractor's statutory liability, or if such insurance could have covered the damages under a policy with an insurer licensed to operate in Germany which is available at regular premium rates and with regular premium surcharges, covering non-exceptional circumstances.
4. Superseding paragraph 4, the statutory claims expiration periods shall apply if the Contractor holds insurance coverage as per point 3 or could have obtained such coverage, or if special insurance coverage was agreed.
5. Limitations and expansions of liability may be agreed in special, justified cases.

§ 14 Billing

- (1) The Contractor must send verifiable invoices to bill for work performed. The Contractor must prepare invoices in orderly fashion, stating items in the proper order and using the designations used in the contractual documents. Quantity calculations, drawings and other documentation required to establish the nature and scope of work are to be attached. Amendments and addenda to the contract must be specially designated on the invoice and upon request shall be billed for separately.
- (2) Inspections to verify work progress for billing purposes shall be conducted jointly whenever possible. The billing-related provisions of the Technical Terms & Conditions and of other contract documents must be observed. For completed work which is difficult to verify after subsequent work steps have been performed, the Contractor must request a joint inspection promptly in advance.
- (3) For work with a contractual execution period of a maximum three (3) months, the final invoice must be submitted within 12 business days of completion unless otherwise agreed. For every period of three (3) months extending the execution period, the invoicing period extends by 6 business days.
- (4) If the Contractor fails to submit a verifiable invoice despite the Procurer setting a reasonable deadline to do so, the Procurer may prepare the invoice himself at the Contractor's expense.

§ 15 Work billable by the hour

- (1) 1. Work billable by the hour shall be invoiced in accordance with contractual provisions.
2. Where fees have not been agreed, the fee level customary for that local area shall apply. If such cannot be determined, the fee shall be calculated as the Contractor's labor costs for the construction site, labor-related costs for the construction site, materials costs for the construction site, costs for installations, equipment, machinery and mechanical systems at the

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construction site, freight, haulage and loading costs, social security contributions and special expenses attendant with economical management plus reasonable markups for overheads and profit (including general entrepreneurial risk) and sales tax.

- (2) If the Procurer requires work billable by the hour to be supervised by a foreman or other supervisor, or if supervision is necessary under applicable accident prevention regulations, paragraph 1 shall apply accordingly.
- (3) The Procurer must be notified prior to the commencement of work billable by the hour. Except as otherwise agreed, records (timesheets) are to be kept per business day or business week depending on customary practice documenting the number of hours worked and necessary expenses incurred, separately reimbursable, for the consumption of materials, the provision of facilities, equipment, machinery and mechanical systems, for freight, transport and loading and any special cost items. The Procurer has six (6) business days following the receipt of timesheets to sign off on and promptly return these. The Procurer may note any objections on the timesheets in question or outline such separately in writing. Timesheets not returned by the deadline shall be deemed accepted.
- (4) Invoices based on timesheets must be promptly submitted after completion of work billable by the hour, and in no case less frequently than every four (4) weeks. Payment is governed by § 16.
- (5) If work billable by the hour was agreed but the amount of work billable by the hour is in question because timesheets have not been promptly submitted, the Procurer may demand that the fee payable for work verifiably executed shall be calculated by estimating reasonably economical work time and consumption of materials plus amounts for the provision of installations, equipment, machinery and mechanical systems, for freight, transport and loading and for any special costs, as per paragraph 1 point 2.

§ 16 Payment

- (1)
 1. Installment payments shall be permitted upon request at the shortest possible intervals or at the agreed times, for the amount representing the value of the respective work/services documented as contractually conforming plus the stated sales tax in the applicable amount. A verifiable statement must be provided as documentation which enables a quick, reliable overview of the work/services performed. The work/services to be documented also include construction elements required for the project which are specially produced and provided and for materials and construction elements delivered to the construction site if ownership thereof has either been transferred or corresponding surety has been provided to the Procurer, at the Procurer's discretion.
 2. The right to assert counterclaims may be reserved. Other rights may only be reserved in the cases provided for in the contract and as permitted by statutory law.
 3. Claims for installment payments shall be due within 21 days of receipt of the statement.

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4. Installment payments have no effect on the Contractor's liability, and do not constitute acceptance of work/service elements.
- (2)
 1. Advance payments may be agreed even after contract conclusion, in which case sufficient surety must be provided upon request by the Procurer. Except as otherwise agreed, interest shall accrue on advance payments at a rate of 3 percentage points above the base rate per § 247 BGB.
 2. Advance payment amounts shall offset the next payments due which represent compensation for the work/services concerned in that advance payment arrangement.
 - (3)
 1. The claim to the final payment shall be due immediately upon review and verification of the final invoice, within 30 days of receipt thereof. This period may be extended to a maximum 60 days if and as expressly agreed and objectively justified given the special nature of the situation or by contractual features. The Procurer may no longer invoke insufficient verifiability as grounds of objection, stating the reasons, if objection is not raised prior to elapse of the applicable period. The final invoice is to be reviewed on an accelerated basis, to the extent possible. If such review is delayed, the undisputed credit amount shall be payable immediately as an installment payment.
 2. Upon acceptance of the final payment free of any reservation, subsequent claims are excluded if the Contractor has been notified of the final payment in writing and advised of this exclusionary effect.
 3. If the Procurer issues a final written rejection of any further payments referring to the payments made, final payment shall be deemed rendered.
 4. Claims asserted prior thereto which remain unsettled shall be thereby excluded unless re-asserted.
 5. To re-assert claims, objection to declaration of final payment must be issued within 28 days of receipt of the corresponding notification of final payment per points 2 and 3. Such claims shall expire unless a verifiable invoice for the positions concerned in the objection is submitted, or a detailed, justified explanation of the asserted claims if the former is not possible, within a further period of 28 days starting on the day after the end date of the 28-day period per sentence 1.
 6. The exclusion periods do not apply to any demand for corrections to the final invoice and final payment because of measurement, calculation or carryover errors.
 - (4) Payment due for specific, discrete work project elements may be finally determined and rendered following partial acceptance without regard to the completion of other work/services.
 - (5)
 1. All payments due shall be settled on the most accelerated basis possible.
 2. Discounts are impermissible except as agreed.
 3. If the Procurer does not render payment by the due date, the Contractor may set an appropriate grace period to do so. If the Procurer fails to pay within the grace period, the Contractor shall be entitled to charge interest from the date after ending of the grace period applying the rates per § 288 paragraph

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BGB, unless able to demonstrate having incurred a greater amount of damages due to default. The Procurer shall be in payment default however no later than 30 days after receipt of the invoice or the statement in case of advance payments without setting of a grace period being required if the Contractor has fulfilled his contractual and legal obligations and has not promptly the due payment amount, unless the Procurer is not responsible for the payment delay. This period may be extended to a maximum 60 days if and as expressly agreed and objectively justified given the special nature of the situation or by contractual features.

4. In the event of payment default, the Contractor may cease work until payment is made if an appropriate grace period set for the Procurer remains unmet.

- (6) To fulfill his obligations per paragraphs 1 - 5 the Procurer is entitled to make payments to the Contractor's creditors if the creditors are involved in the execution of the Contractor's contractual work/services under a service or work contract concluded with the Contractor, justifiably refuse to continue work due to payment default on the part of the Contractor and such direct payment is made to ensure the continuation of work. Upon request by the Procurer the Contractor shall declare within a period set by the Procurer to what extent the Contractor will recognize any claims of the Contractor's creditors. If such declaration has not been made by the deadline, the conditions for rendering direct payment shall be deemed accepted.

§ 17 Surety

- (1) 1. If provision of a surety has been agreed, §§ 232-240 BGB shall apply, except as regulated otherwise in the provisions below.
2. Sureties serve to ensure proper contractual performance and the enforcement of defect claims.
- (2) Except as otherwise agreed in the contract, surety may be provided by way of retaining or depositing funds or in the form of a guarantee from a bank or credit insurer that is
1. licensed in the European Community,
 2. in a state which is a contracting party to the Agreement on the European Economic Area or
 3. in a state which is a contracting party to the WTO Agreement on Government Procurement.
- (3) The Contractor chooses which of the different types of surety to provide, and may replace type of one surety with another.
- (4) Providing surety in the form of a letter of guarantee is contingent upon approval by thereof by the Procurer as adequate. The declaration of guarantee must be submitted in writing, waiving the right to insist on prior failed attempt at direct enforcement (§ 771 BGB). The guarantee may not be limited to a specific period of time and must be issued in accordance with the Procurer's requirements. The Procurer may not demand a letter of guarantee as surety which obligates the guarantor to make payment upon initial demand.

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- (5) If surety is provided in the form of deposited funds, the Contractor must deposit the amount to an escrow account at a bank to be agreed on which the parties can only access jointly ("escrow account"). The Contractor shall be entitled to any interest accruing in this account.
- (6) 1. If it is agreed that the Procurer is to retain a surety amount from partial payments made by the Procurer, the amount of such payments may be reduced by a maximum 10 percent until the agreed total surety amount to be retained has been reached. If invoices are issued without stating sales tax in accordance with § 13 b of the Sales Tax Act (UStG), sales tax shall not be taken into account in calculating the retained surety amount. The Procurer must notify the Contractor of the respective amounts retained and transfer the amounts in question within 18 business days of such notification to an escrow account at the agreed bank. The Procurer must simultaneously instruct at the agreed bank. The Procurer must simultaneously instruct the bank in question to notify the Contractor of depositing of the surety amount. Paragraph 5 shall apply accordingly.
2. With smaller or short-notice orders it is permissible for the Procurer to deposit retained surety amounts to an escrow account at a later point when rendering the final payment.
3. If the Procurer fails to promptly deposit the amount retained, the Contractor may set an appropriate grace period to do so. If the Procurer fails to meet the grace period deadline the Contractor may demand immediate payment of the amount retained and shall be thenceforth released from obligation to provide surety.
4. Public-sector procurers are entitled to deposit amounts retained as surety to a non-interest-bearing holding account of their own.
- (7) Except as otherwise agreed, the Contractor must provide the surety within 18 business days of conclusion of the contract. If the Contractor fails to meet this obligation, the Procurer shall be entitled to retain the agreed surety amount from the Contractor's credit balance. Paragraphs 5 and 6 furthermore apply mutatis mutandis, except for point 1 sentence 1.
- (8) 1. The Procurer must return any portion of the surety left unutilized for contract fulfillment at the agreed point in time, to be no later than the point of acceptance and provision of the surety bond for defect claims unless the Procurer has outstanding claims not covered by the surety bond provided for for defect claims. The Procurer may retain a corresponding amount of the surety to cover such contract fulfillment claims.
2. The Procurer must return any unutilized surety for defect claims in two (2) years' time unless a different return date is agreed. The Procurer may however retain a corresponding portion of the surety for any asserted claims which remain outstanding at that point in time.

§ 18 Disputes

- (1) If the conditions are met for an agreement on place of jurisdiction pursuant to § 38 of the Code of Civil Procedure, the place of jurisdiction for any disputes

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arising from the contract shall exclusively be that of the seat of the entity responsible for legal representation of the Procurer, unless otherwise agreed. The Contractor is to be notified thereof upon request.

- (2) 1. In case of conflicting views regarding contracts with public authorities, the Contractor shall first seek resolution with the entity directly superior to the procurer entity. This is in order to give the Contractor opportunity for a verbal hearing and allow, if possible, issuance of written notice of a decision within 2 months of filing complaint, pointing out the legal consequences of sentence 3. Such decision shall be deemed recognized unless the Contractor lodges written objection with the Procurer within three (3) months of receipt of such notification, as long as the Procurer has informed the Contractor of the exclusion deadline.
2. The expiration of claims period for the claim asserted in the written request for a procedure as per point 1 shall be suspended upon receipt of that request. The Procurer or the Contractor shall inform the respective counterparty in writing accordingly if no longer interested in continuing the procedure. The period of suspension shall end three (3) months after receipt of the written decision notice or of the notification per sentence 2.
- (3) A mediation procedure may also be agreed, for which a corresponding agreement should be implemented at contract conclusion.
- (4) In the event of conflicting views regarding the characteristics/properties of materials or construction elements for which there are generally accepted testing procedures and the admissibility or reliability of the machines or testing methods employed is contested, after notifying the respective counterparty in advance either contracting party may have technical testing of the materials performed by a state or state-recognized materials testing center, the findings from which shall be binding. The party whose view is not corroborated shall bear the corresponding costs.
- (5) Disputes do not constitute grounds for the Contractor to cease work.