

Building Contract

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Legal Aspects of German Building Contracts

The Need for Building Contracts

Every landlord will sooner or later face the situation that he or she seeks help from external sources regarding their property – the energy consultant in order to identify energy saving potential or the handyman in order to realize this potential. Although there are no formal requirements for building contracts the essentials should be put in writing for smaller projects, whereas for bigger projects it would be negligent to have no written contract. Care and planning is essential to ensure that you end up with what you want, but if not there should be a remedy to manage this.

Legal Aspects from a German Point of View

This article focuses on legal aspects of building contracts from a German point of view. It shall not substitute legal advice nor be transferred to Swedish or other national law - comments on national differences are most welcome. Legal terms cannot be translated from one language to another without the risk of loosing relevant information, therefore in the following some German terms with legal relevance will be explained but not translated and the German word will be in brackets.

A building contract is a “Werkvertrag”

A “Werkvertrag” according to sections 631ff of German Civil Code (BGB) is a type of contract which obliges the contractor to produce the promised work and the employer to pay the agreed remuneration. The subject matter of this contract may either be the production or alteration of a thing or another result to be achieved by work or by a service. This is different to a service contract (sections 611ff BGB).

A labour contract, as well as the doctor’s treatment of a patient, are service contracts. The doctor gets paid for the treatment but not for the result of the treatment, compared with the bricklayer getting paid for the finished wall but not for his effort to build the wall. The taxi driver gets

paid for driving you from A to B, but not for taking you in their taxi for 30 minutes.

The main characteristics of a “Werkvertrag” are

- Contractor produces the promised work
- Employer pays the agreed remuneration
- Remuneration to be paid upon acceptance of the work
- Promised work free of material and legal defects
- Risk allocation changes from contractor to employer upon acceptance of the work

“Vergabe- und Vertragsordnung für Bauleistungen” (VOB)

The terms of a „Werkvertrag“ apply for contracts in different branches, from taxi-driving to design and buildings and real estate. The contracting parties of a building contract can agree on applying to VOB, which are rules and standards set out especially for construction contracts. VOB complements as well as changes modalities of a “Werkvertrag” according to BGB.

Contents of a Building Contract

A building contract does not necessarily need to be written, but parties can also enter into a contract verbally, or by implied intent.

Define the *Promised work* as clearly as possible. Plans and specifications may help. All works have to be in line with generally accepted rules of technology (DIN). If VOB is agreed on, the work may be varied at the request of the employer, and the costs of any variation will be added to the contract price.

Specify *Commencement of works* and *Completion date*. The contractor has to give notice if and when works are delayed due to reasons for which they are not liable.

Decide the type of *Remuneration*:

- Price per unit
- Lump sum
- Hourly rate
- Cost-plus

VOB clearly states that you only have to pay what you ordered. If cost-effective variations are necessary, the contractor has to give notice of this in writing to the employer before commencement of the works; otherwise there is no claim for remuneration.

Remuneration is due upon acceptance according to BG B. The contractor may demand *part payments* for coherently definable

parts of the work. This also applies to specially designed or prepared materials or components. There is only a claim if ownership of the parts of the work or materials is transferred to the employer or security is provided for this. This may interfere with the employer's interest of risk allocation. Part payments according to VOB are less restrictive and total payment is due upon acceptance of work AND final invoice. Please note that there are certain requirements regarding the testability of the final invoice.

According to BGB there is no reminder necessary for status of *Late Payment*, but according to VOB reminder and period of grace is necessary. If payment is late, payment plus interest is due.

If the *work is defective*, according to BGB the employer may demand

- that it is remedied,
- remedy the defect themselves and demand reimbursement,
- withdraw from the contract,
- reduce payment or
- claim for compensation.

VOB puts focus on remedying of defects. Payments can be reduced by up to the double amount for remedying the defect, but not just for trivial defects.

Acceptance of the work means that the promised work has been produced and the employer accepts the work. Remuneration becomes due, allocation of risk changes and the start of guarantee period are the most relevant aspects of acceptance. The employer is obliged to accept the work produced in conformity with the contract. Acceptance may not be refused by reason of trivial defects. According to VOB acceptance also takes place twelve days after written notice of completion of the work – without any comment of employer - or by using the work or paying the final invoice.

The employer can *terminate* the VOB-contract at any time, even without any reason. If the termination is due to the fault of the contractor, the employer can claim for compensation.

The *Guarantee period* of buildings and parts of it is five years according to BGB, four years according to VOB and two years each for other works. A notice of defect starts another two year guarantee period according to VOB. The contractor may have a security deposit – redeemable against surety – for the time of the guarantee period.

VOB sets well-balanced rules and standards for smaller and medium projects, for bigger and more complex works plain VOB may not be sufficient to prevent disputes between the parties.

Contract for International Building Projects

The *International Federation of Consulting Engineers* (FIDIC) issues contracts which are common for international and/or complex building projects. Depending on the scope of work, especially design works, *FIDIC – Red Book, Yellow Book, Silver Book* or *Green Book* is the appropriate type of contract.