

# **Standard business terms and conditions of Bayer Real Estate GmbH for contracted results and activities as well as for brokerage and procurement transactions**

## **A. Scope**

- (1) These standard business terms and conditions (hereinafter "Terms") apply to all contracts between Bayer Real Estate GmbH (hereinafter "BRE") and entrepreneurs within the meaning of section 14 of the German Civil Code [*Bürgerliches Gesetzbuch*], legal entities under public law, and/or special public-law funds (hereinafter "Client") for contractual performance of any type, especially contracted results and activities, and brokerage or procurement transactions, except if specific services are governed by individual contracts.
- (2) Any terms and conditions of the Client that contravene or vary from these Terms shall be inapplicable except if BRE has expressly agreed to their applicability. This shall also be the case if BRE renders its performance without reservation while knowing of terms and conditions of the Client that contravene or vary from these Terms. These Terms shall also apply in their respective current version to all future contracts between BRE and the Client for contractual performances pursuant to subsection (1).
- (3) BRE may have the services referred to in subsection (1) performed in whole or in part by third parties.
- (4) In part B, these Terms provide the terms and conditions for contracted results, in part C for contracted activities, and in part D for brokerage and procurement transactions. Part E contains the general provisions that apply to all contractual performances within the meaning of part A, subsection (1), rendered by BRE.

## **B. Contracted results**

### **1. Subject matter of the contractual performance**

BRE shall deliver the particular results defined in the written order confirmation, the subject matter of which may include, without limitation, the following:

- Servicing and repair of buildings;
- Dismantling and demolition work;
- Development and improvement measures;
- And in special cases, supply and disposal services, including the receiving of solid waste and wastewater at recycling, removal or treatment facilities.

### **2. Acceptance**

The following provisions shall apply if an acceptance inspection has been stipulated for a contractual performance referred to in part B, section 1:

- (1) BRE shall notify the Client that the deliverables have been completed.
- (2) Upon the receipt of the notice of completion pursuant to subsection (1), an acceptance inspection of the deliverables shall be conducted. Acceptance is conditioned upon successful performance testing. The performance testing is successful if the deliverables have no, or only immaterial, defects. The Client shall promptly confirm the acceptance upon successful performance testing.
- (3) If no formal acceptance inspection is conducted contrary to subsection (2), then the deliverables shall be deemed accepted if:
  - a. the user does not conduct an acceptance inspection within a time limit stipulated by BRE in spite of an obligation to do so;
  - b. the Client has used the deliverables for a period of four weeks without having issued a notice of defects that would have prevented acceptance; or
  - c. the Client pays the invoice without reservation.

### **3. Warranty**

- (1) The Client shall promptly examine the performance rendered by BRE and promptly notify BRE in writing of any defects.
- (2) Notwithstanding possible rights to compensatory damages or reimbursement of expenses, the Client shall

have the rights set forth in the following:

- a. BRE shall remedy defects in quality within a reasonable time limit (subsequent performance). At BRE's option, this shall be done by repairing the defect (repair) or by rendering the performance again (replacement).
  - b. In case of a substantial defect in quality, the Client may rescind the contract (rescission) or reduce the price (price reduction). Exercising the right of rescission is subject to the condition that the Client has previously set a reasonable time limit for subsequent performance by BRE and in doing so has expressly stated that it will rescind the contract if the time limit should expire to no avail. Such a qualified setting of a time limit is not required, however, if subsequent performance is frustrated due to the respective defect, is unreasonable for the Client, or is refused by BRE, or if this is justified for other reasons, taking the mutual interests into account.
  - c. In case of an immaterial defect in quality, the Client may reduce the remuneration, provided that subsequent performance is frustrated due to the defect, is unreasonable for the Client, or is refused by BRE, or if this is justified for other reasons, taking the mutual interests into account.
  - d. The Client's right to correct defects on its own accord and to be compensated for the expenses to that end (section 637 of the German Civil Code) is expressly excluded.
- (3) No claims shall be allowed for defects caused by a change to the work product by the Client, except if the Client proves that the respective defect cannot be attributed to the change.

#### **4. Infringements of industrial property rights**

- (1) BRE shall ensure that the work product it delivers is free of third-party industrial property rights and that no other rights exist to its knowledge that may limit or preclude the use as contracted.
- (2) The Client shall promptly notify BRE if a third party should make a claim against the Client for an infringement of industrial property rights arising from the use of the work product created by BRE. BRE shall satisfy or defend the claim or settle it by a compromise at its own discretion and expense. To that end, the Client concedes to BRE the sole power to decide on legal defenses and settlement negotiations. The Client shall grant all authorizations to BRE needed in this respect in a given matter.
- (3) If any work product created by BRE should or might become the subject matter of an infringement of industrial property rights, BRE shall remedy the cause for the infringement claim within a reasonable time limit. At BRE's option, BRE shall do so by:
  - obtaining the right to continuing the use of the work product; or
  - modifying or replacing the work product to a reasonable extent.
- (4) If remedying the cause for the infringement claim should fail, be unreasonable for the Client, or is refused by BRE, or if this is justified for other reasons, taking the mutual interests into account, then the Client, notwithstanding possible rights to compensatory damages or reimbursement of expenses, shall have the right to rescind the contract (rescission) or to reduce the remuneration (price reduction).
- (5) If a work product delivered by BRE should infringe third-party industrial property rights and this can be attributed to materials, plans or other items furnished by the Client, then any liability of BRE shall be excluded, and the Client shall indemnify BRE against all third-party claims.

### **C. Contracted activities**

#### **1. Subject matter of the contractual performance**

BRE shall perform the activities defined in the written order confirmation, the subject matter of which may include, without limitation, the following:

- Building engineering services;
- Provision and operation of building control systems;
- Services for office and special-purpose spaces, laboratories, or conference rooms;
- Building cleaning services;
- Moving services;
- Agricultural services;
- Consulting and planning services, including the provision of plans and geodata.

#### **2. Termination**

- (1) The agreement for the performance of activities may be terminated by either party as of the end of a month upon notice of one calendar month, except as otherwise expressly agreed.
- (2) The right to termination for cause shall be governed by part E, section 13.

#### **D. Brokerage and procurement services**

##### **1. Subject matter of the services**

BRE shall perform the brokerage or procurement services defined in the written order confirmation, the subject matter of which may include, without limitation, the procurement of improved and unimproved real properties for purchase, and the procurement of rental properties.

##### **2. Brokerage fees**

- (1) BRE shall receive from the Client – as well as from the seller – a brokerage fee of 3 % of the purchase price for the procurement of improved or unimproved real properties for purchase. This shall not apply to new construction projects carried out by BRE itself. No brokerage fees shall be due for the latter.
- (2) BRE shall receive a brokerage fee equal to two monthly rent amounts for the procurement of a rental property. If operating costs are itemized separately, they shall not be included in calculating the brokerage fee. Notwithstanding the first immediately preceding sentence, the brokerage fee for the leasing of rental properties for a period of up to 12 months shall amount to:
 

- leasing period of up to 1 month:	30 % of one month's rent
- leasing period of up to 2 months:	40 % of one month's rent
- leasing period of up to 3 months:	55 % of one month's rent
- leasing period of up to 4 months:	70 % of one month's rent
- leasing period of up to 5 months:	85 % of one month's rent
- leasing period of up to 6 months:	90 % of one month's rent
- leasing period of up to 9 months:	100 % of one month's rent
- leasing period of up to 12 months:	125 % of one month's rent
- leasing period exceeding 12 months:	200 % of one month's rent
- (3) Statutory value-added taxes shall be added to brokerage fees.
- (4) Agreements for subtenancies, use and occupation, possession, accommodation, and similar agreements shall be accorded the same treatment as leases, even if they have been formed orally. Cancellation, early termination of the tenancy, or vacating before the stipulated lease term expires shall not reduce the brokerage fee. Subsequent changes to the rent amount shall not result in a change to the basis for calculating the brokerage fee.
- (5) All brokerage fees shall have been earned and shall be due at the time when the brokered or documented transaction closes in a legally effective manner.
- (6) Procurement activities as regard to companies affiliated with BRE pursuant to section 15 et seq. of the German Stock Corporation Act [*Aktiengesetz*] are exempt from the duty to pay a brokerage fee.

##### **3. Notification requirements**

- (1) The Client shall promptly notify BRE – stating the source – if the property that is to be procured is already known to the Client.
- (2) The Client shall promptly notify BRE of any contract modifications or addenda that have been agreed on subsequent to the brokered lease agreement's formation.

#### **E. General provisions**

##### **1. Offers without engagement**

- (1) Offers made by BRE are without engagement. Supporting documents belonging to an offer, for example, images, drawings, indications of weights and measurements, and any other information and data are only approximations unless expressly designated as binding. In case of doubt, cost estimates are to be reasonably remunerated.
- (2) The offers, as well as all calculations, plans, drawings, data, etc. prepared by BRE, shall neither be duplicated nor provided to third parties without BRE's written consent, and they shall remain the property

of BRE.

- (3) The supporting documents may only be used for the contractually stipulated purposes. In particular, they shall not be used to reproduce the same or similar products. They shall be returned to BRE upon demand if the offer does not result in the placing of an order.
- (4) The following shall apply, moreover, to the receiving of solid waste and wastewater at recycling, removal or treatment facilities of BRE or its contractors: Solid waste and wastewater will only be received subject to available capacities. If recycling, removal or treatment facilities of BRE or its contractors should break down or be unavailable due to increased in-house or third-party needs subsequent to contract formation, then BRE shall be released from the performance obligation.

## **2. Orders**

- (1) The Client shall be bound by its written orders for a period of three weeks. The contract is only formed once BRE has confirmed the order in writing or has started to render performance. Subsequent modifications, addenda or collateral agreements may only be made in writing by mutual consent.
- (2) Promises and stipulations made prior to contract formation shall only be effective if they are set forth in writing in the individual contract.

## **3. Client's obligations**

- (1) The Client shall ensure without any specific request that BRE receives all documents and information required to render the performance.
- (2) In rendering the performance, BRE has the right to assume that all facts stated by the Client, especially numerical data and documents that have been provided, are correct and complete, except if a review has been expressly agreed on.
- (3) The following shall apply, moreover, to the receiving of solid waste and wastewater at recycling, removal or treatment facilities of BRE or its contractors:
  - a. The Client is responsible for complying with the specifications stipulated in the individual contract (for example, waste data sheets). Specifications shall include the packaging and manner of delivery. The times during which deliveries will be received shall be agreed on in the individual contract and shall be observed. Deliveries outside of the stipulated times may be refused by BRE or its contractor. Instructions by BRE or its contractor concerning the inputting of solid waste and wastewater shall be followed. The respective site's safety and administrative rules in effect at the time in question shall apply.
  - b. Deliveries shall be made by the Client itself, or a third party hired by the Client, at the Client's expense and in compliance with the law, using vehicles and containers that enable the deliveries to be received at the facilities of BRE or its contractor. The Client agrees to comply with all pertinent legal requirements. In case of cross-border shipments, those requirements include especially Council Regulation (EEC) No 259/93 and the German Waste Shipment Act [*Abfallverbringungsgesetz*].
  - c. In the event of changes or divergences from the specifications or a breach of other terms, BRE, or its contractor, has the right to refuse the shipment in whole or in part. If an alternative recycling, removal or treatment method could be considered in such a case, then the contracting parties shall review whether that approach is feasible. Any costs incurred due to the refusal or the alternative recycling, removal or treatment shall be borne by the Client.
- (4) If industrial property rights should arise under the order, then BRE is granted the right to obtain a non-exclusive right of use from the Client at reasonable and customary terms and conditions.

## **4. Performance standards and performance modifications**

- (1) BRE shall render the performance in accordance with accepted engineering standards.
- (2) If it becomes clear during the rendering of the performance that the contracted performance cannot be completed, or can only be completed with a substantially modified outlay of technology and personnel, for reasons beyond BRE's control, then BRE shall promptly notify the Client. The contracting parties will decide whether, to what extent, and at what cost the project is to be continued. If no mutual consent is achieved, then each party has the right to terminate the contract by written notice. In this event, BRE shall have the right to be compensated for all expenses incurred up to that time and to be paid remuneration consistent with the actual performance.

## **5. Remuneration and terms of payment**

- (1) Provided that no brokerage fee within the meaning of part D, section 2, is involved, the remuneration for BRE's services shall be calculated based on the provisions of the individual agreement or the schedule of standard prices. All prices are understood to be net prices to which the statutorily required valued-added tax will be added.
- (2) To the extent that calculating the remuneration for services involving the receiving of solid waste and wastewater at recycling, treatment or removal facilities depends on a determination of weight, such determination shall as a rule be made based on a weighing at the time of delivery.
- (3) BRE has the right to issue interim invoices at any time based on the respective costs that have been incurred.
- (4) Invoiced amounts are due and payable in full within 8 days after the invoice date. As regards the receiving of solid or liquid waste, payments become due upon the receipt of the delivery. The Client shall fall into default after 30 days following the due date without the need for a further demand for payment. Interest at a rate of 8 % above the base lending rate shall be added to the Client's debt during the period of the default. The right to claim additional damages caused by the default is being reserved.
- (5) In the event of late payment of the remuneration for a contracted performance, BRE also has the right to refuse further performance of the contract and of related follow-on contracts.

## **6. Time limits and deadlines**

- (1) BRE shall perform its obligations within reasonable time limits. Deadlines set forth in the order confirmation or other supporting documents for the rendering of performance are non-binding planning deadlines. They constitute binding contractual deadlines only if they have been expressly designated as such.
- (2) To the extent that binding contractual deadlines have been agreed on and BRE falls into default, the Client shall provide for a reasonable grace period, which generally shall not be less than 4 weeks.

## **7. Impediments to performance; force majeure**

Force majeure of any kind, unforeseeable operational, traffic or shipping disruptions, fire damage, flooding, unforeseeable shortages in labor, power, raw materials or supplies, strikes, lockouts, governmental orders, or other impediments beyond the control of the party owing a contractual duty that delay or prevent performance, shipments or acceptance, or make them unreasonable, shall suspend the duty to perform or to ship or accept for the duration and extent of the disruption. If binding contractual deadlines are exceeded by more than 8 weeks due to the disruption, then each party has the right to rescind or terminate the respective contract.

## **8. Place of performance**

Except as otherwise provided in the order confirmation, the contracted performance is deemed to be rendered "ex works" within the meaning of the Incoterms 2000. The Client shall reimburse BRE for any actually incurred and reasonable transportation and travel expenses required to render the contracted services.

## **9. Retention of title**

- (1) BRE shall retain title to any items delivered (privileged items) until all claims of BRE against the Client arising from the business relation, including claims accruing in the future also from concurrently or subsequently formed contracts, have been settled. The retention of title shall remain in existence even though individual claims of BRE have been included in a current account and the balance has been drawn and confirmed.
- (2) Without setting a grace period and without rescinding the contract, BRE has the right to demand that the Client surrender the privileged item if the Client has defaulted on its obligations. The taking back of the privileged item shall entail a rescission of the contract only if this has been expressly declared by BRE. If BRE should rescind the contract, then there shall be a right to reasonable remuneration for permitting the use of the privileged item until its return.
- (3) The client shall hold the privileged item in safe custody for BRE, maintain and repair it at its own expense, and insure it at its own expense against loss and damage at the level that can be demanded from a prudent businessperson. The Client hereby already assigns its rights under the insurance policies in advance to BRE, which accepts the assignment.

## **10. Liability for damages**

- (1) BRE shall be liable for compensatory damages according to law for personal injury and for damages pursuant to the German Product Liability Act [*Produkthaftungsgesetz*].
- (2) BRE shall be liable for other damages subject to the following provisions:
  - a. BRE shall be liable according to law for damages caused by fraudulent conduct and for damages caused by its intentional or grossly negligent conduct or that of its legal representatives or executives.
  - b. BRE shall be liable for compensatory damages, limited to the amount of foreseeable damages that are typical for contracts, in the event of damages due to a slightly negligent breach of material contract obligations or essential duties [*Kardinalpflichten*] (1<sup>st</sup> alternative) and in the event of damages caused by simple vicarious agents of BRE through gross negligence or intent without a breach of material contract obligations or essential duties (2<sup>nd</sup> alternative). In addition to the primary contractual obligations, essential duties for purposes of this provision include obligations the fulfillment of which make performance of the contract in due course possible in the first place and on the compliance with which the Client may always rely.
  - c. As regards to section 10, subsection (2)b., 1st alternative, BRE shall not be liable for lost profits, indirect damages, consequential damages due to defects, and claims by third parties.
  - d. Any other liability of BRE shall be excluded.
  - e. The Client shall promptly notify BRE in writing of any damages for purposes of the preceding liability provisions, or allow them to be recorded by BRE, so that BRE is informed as early as possible and may still mitigate them, possibly jointly with the Client.
- (3) The following shall apply, moreover, to the receiving of solid waste and wastewater at recycling, treatment, or removal facilities of BRE or its contractors: The Client shall only deliver solid or liquid waste that meets the specifications and shall comply with all other terms and conditions. The Client shall be liable for all damages and consequential damages for which it is at fault arising from non-compliance with the specifications or non-adherence to terms and conditions.
- (4) The Client shall be responsible based on fault that industrial property rights of third parties are not infringed due to the delivery and use of resources such as, for example, plans, calculations, test specimens, etc., and it shall indemnify BRE against any and all claims. The Client shall bear the reasonable royalties or costs that are incurred for purposes of avoiding infringements of industrial property rights.

## 11. Limitation of actions

- (1) Except in the event of fraudulent intent, the Client's right to subsequent performance for:
  - a. defects in quality; or
  - b. defects of title not consisting of a third-party claim by the owner for the return of property or of other rights in rem;
 shall become time-barred within 12 months – and within 5 years in case of construction services – starting with the delivery of the products or the acceptance of the performance, as the case may be.
- (2) Except in the event of intentional conduct or gross negligence, the Client's right to compensatory damages for:
  - a. defects in quality; or
  - b. defects of title not consisting of a third-party claim by the owner for the return of property or of other rights in rem;
 shall become time-barred within 12 months – and within 5 years in case of construction services – starting with the delivery of the products or the acceptance of the performance. This shall not apply if the Client's damages at issue involve personal injury. Personal injury claims shall become time-barred within the statutory limitations period.

## 12. Confidentiality

- (1) For a period of 5 years starting with contract formation, the parties shall treat all information and know-how becoming known to the parties that a party receives from the other party as confidential and shall not make such information or know-how available to third parties or use it for commercial purposes, except

as otherwise agreed in writing. This obligation shall not apply to such information or know-how of which it can be proven that such information or know-how, in its entirety, was:

- a. already known to the receiving party or common knowledge at the time of its transfer, or that it had become common knowledge after its transfer without the receiving party's fault;
- b. provided by a third party to the receiving party after its transfer without comparable obligations of confidentiality;
- c. made known by the receiving party to a third party who is an advisor in a legal, business, or tax consulting profession that is subject to a duty of confidentiality by law.

(2) The Client shall regard BRE's offer without engagement as a trade secret and treat it as confidential.

### **13. Termination for cause**

(1) Either party may terminate the contract for cause without notice. BRE shall have the right to terminate for cause in particular if:

- a. the Client commits a serious breach of its contractual obligations, provided that a remedial period pursuant to section 314(2) of the German Civil Code has expired to no avail or a formal warning notice pursuant to section 314(2) of the German Civil Code has been to no avail;
- b. insolvency proceedings against all or part of the Client's assets have been requested or opened, or were terminated for insufficiency of assets;
- c. there is cause within the meaning of sections 17 to 19 of the German Insolvency Act [*Insolvenzordnung*] for opening insolvency proceedings against the Client;
- d. the Client's financial condition should deteriorate such that performance of the contract in due course cannot be expected, even if no cause within the meaning of sections 17 to 19 of the German Insolvency Act for opening insolvency proceedings is present; or
- e. in spite of a reasonable remedial period set by BRE, the Client has been in default for more than two months with the payment of a remuneration amount that has become due.

(2) Terminations shall be declared in writing.

### **14. Set-offs, retentions, assignments**

(1) The Client shall have a right of set-off against BRE only if its counterclaims have been determined with legal finality, are undisputed, or have been recognized by BRE.

(2) The Client may exercise a right of set-off only if the counterclaim arises from the same contractual relationship.

(3) The assignment of claims against BRE is barred.

### **15. Final provisions**

(1) The Client's legal relationship with BRE shall be governed by the law of the Federal Republic of Germany, exclusive of the United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980 (CISG Conventions).

(2) The exclusive legal venue for all disputes concerning services involving the receiving of solid or liquid waste under the business relation with BRE shall be Cologne, Germany. The exclusive legal venue for all other disputes arising from the business relationship with BRE shall be Cologne, Germany, or Düsseldorf, Germany, at the plaintiff's discretion. Notwithstanding the foregoing, BRE may also enforce its claims at the Client's place of general jurisdiction.

(As of: July 2008)