

## GENERAL RULES IN WORKS CONTRACTING

BY

**VIOLETA HEREA and I. ȘERBĂNOIU**

**Abstract.** The profession of constructor (builder) involves a great responsibility on the part of the one who performs it in both the technical and legal aspect that it carries.

The one who is called to answer for the quality and durability of construction is the contractor, irrespective of whether it is a natural person or legal entity. For the conclusion of a work contract the law provides that the contractor possess full legal capacity, so that it can meet the legal point of view, all obligations under the contract and to bear any consequences arising from the failure or non-correct / appropriate execution of construction works.

The Romanian legislator has developed a series of normative acts in construction, stipulating the rights, duties and penalties for their failure. Contractual liability of the contractor is involved both in the non performance of the work and work defects, and this will be applicable according to the common law, respectively the penalty clause, liquidated damages, periodic penalty payments.

**Key words:** works contract; contractor; responsibility; working; defects.

### 1. Introduction

In carrying out the activity of any economic agent that performs within the field of construction, an essential element is the works contract. The works contract often raises a number of problems with unintended consequences. What are the general rules of the works contract? What are the risk issues raised by the works contract? What is the responsibility of the contractor? Under what conditions the reception work is done? Under what conditions the works contract may end? How can these problems be avoided? These are some of the questions this paper tries to answer.

## 2. What is the Works Contract and Which are its General Rules?

The works contract is the contract whereby one party, called the *contractor*, undertakes to perform at his own risk a certain work for the other part, called the *client* (beneficiary) in exchange for a fixed price. The works contract is a civil contract.

A key element is the price of the works contract. In the case of large-scale works, the contract is void if the price is not determined or determinable at least at the time of contract conclusion.

When concluding a contract between a contractor and client (beneficiary) should be considered both the general rules of the works contract and the special rules. However, we will refer to the general rules applicable to the works contract.

According to the Civil Code regulations concerning risks in the case of the works contract, there are two aspects of the problem, namely, on the one hand, the risk of fortuitous destruction of the thing/object, and on the other hand, the risk of nonperformance of the contract.

### 3. Assumption of Risk is the Responsibility of the Contractor until Works Delivery

Within the works contract, the risk of material destruction is assumed by the owner, the provision being regulated by Civil Code art. 1479. In our case, the owner is the contractor. The contractor shall remain the owner of the materials until the delivery of the work to the beneficiary and support the damages resulting from their destruction, as the owner.

If the execution of the contract becomes impossible due to the fortuitous event or force majeure, the contractor is not entitled to pay the price because he didn't deliver the work to the beneficiary. Only if the beneficiary was delayed for checking and taking over the work, the client may be forced to pay the price.

If the work was lost due to defects of materials purchased by the client, the contractor will be entitled to claim payment of the price. In such a situation can not be invoked force majeure or fortuitous event because the resulting damage is the result of the client purchase of unsuitable materials.

Although the rule is that the contractor to bear the risks in case of force majeure or fortuitous event, as disposed by art. 1479-1481, Civil Code, within the field of contracting public works, the customer will bear all risks due to force majeure, including the damage resulting from the termination of the contract (if the contract has been suspended).

## 4. The Obligation of the Client to Perform Work Delivery and its Payment

The customer is obliged to perform the delivery and take possession of the work/construction executed after completing it fully. However, the delivery

can be done for each work, for example, if it is the case of several different sections or modules of the work. If the client didn't take over the work, the responsibility can become his problem, respectively, recovery of damages for storage costs, conservation costs, etc.

When the delivery and taking over of the work is performed, the client must pay the price of the work. The exception to this rule is the situation when the parties have stipulated in the contract other special arrangements, regarding the payment of the work. An example is a contract whereby the parties agreed on a total price, and construction is executed on a determined plan. In this case the court can't force the client to pay additional works only if the contractor shall submit a written proof of payment of such works. Failure to pay the price at the date it is stipulated in the contract, forces the debtor to the payment of an updated amount

### **5. The Risk of Nonperformance of the Contract**

By means incurring the risk of nonperformance of the contract it is understand the assumption of damaging consequences of the contract termination by the fortuitous (unexpected) failure performance of the obligation of one of the contracting parties.

As a general rule, the risk of a contract nonperformance is supported in all cases by the debtor, respectively the contractor. If the performance of the contract becomes impossible due to force majeure (earthquake, flood), the contractor shall not be entitled to receive payment because the client did not deliver the work to which the contract was bound.

The contractor is responsible for the nonperformance of the work in front of the client according to common law in matters such as recovery of damages, periodic penalty payments, penalty clause. He will be entitled to receive remuneration if he put in delay the client (he was notified orally or in writing) in terms of its performance of the obligation to check and get the work done. The contractor shall be entitled to be paid the work if failure is due to a hidden defect of the material purchased by the client.

The contractor shall bear the risk of non performance of the contract and if the work, although executed wholly or partly was destroyed, even if its subsequent recovery is still possible. In this case, although the contractor performs the work twice, the client will be required to pay only once, an exception to this situation is that when the client was delayed or the materials purchased by him have been affected by hidden defects, as client has to pay twice the work. But in all the cases the contractor is responsible for the hidden defects after the client received the work, even if the work was not executed by him personally.

Unlike the apparent defects, the hidden defects can not be detected by usual means of verification or reception. Basically, if these defects were known to the client, he would not have bought the work or would not be paid the same price.

Receiving and reception of the work from the client – no objections and reservations (if not obtained by fraud) – is equivalent to contactor's relief and client forfeiture of the right to invoke the apparent defects of the work. For these defects, the contractor may incur liability if, by law or contract, he attached guarantee within the established deadline for the work.

The right to action regarding the hidden defects is regulated by Art. No 5 from the Decree 167/1958 and is prescribed in a period of six months if the defects were not cunningly hidden.

If the defects were hidden cunningly, the prescription of the right to action shall start on the date the defects were discovered, but not later than the expiry of three years from delivery (Article 11, paragraph 2 of Decree nr. 167/1958).

The prescription terms shall start on the date the defects were discovered but not later than an year from the delivery of the work (art.11, paragraph 2 of Decree no. 167/1958)

The reason for creating an extended warranty for a construction is motivated by the fact that on one hand the hidden defects of the construction cannot be observed in a short time (they appear much later), and on the other hand, the client, in most cases is not a professional to be able to acknowledge the construction defects. These considerations justify the extended warranty that the contractor owes his client.

## **6. The Conditions in Which the Works Contract May Terminate**

According to the Civil Code, the works contract (abolish) terminate by the death of the craftsman, architect or contractor, according to art. 1485. On the death of the contractor, his heirs are entitled to receive from the client the value of work performed and materials purchased by the contractor (but not used until his death), for carrying out the work, provided that all of these to be useful to the client (according to art.1486, Civil Code). When the contract does not provide the necessary elements, the amounts to be paid are determined by experts.

Like in any mutually binding contract (bilateral), which provides rights and obligations for both parties, the contract can be terminated at the request of either party for defaults of the other party.

## **7. Conclusions**

To prevent the consequences that may arise from a situation of ambiguity in the wording of some contractual terms, it is recommended that at the time of concluding the works contract, the parties to consider all aspects mentioned above.

The responsibility for the quality and sustainability of the construction always reverts to the constructor no matter if this is an individual or legal entity.

The contractor is responsible in all the cases for the hidden defects of the work even after the beneficiary receives it and even when the work was not carried out by him personally.

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„Gheorghe Asachi” Technical University of Iași,  
Department of Concrete Structure, Building  
Materials, Technology and Management  
e-mail: violeta.herea@gmail.com

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13. \* \* Legea nr. 10/1995 privind calitatea în construcții.

#### REGULI GENERALE ÎN CONTRACTUL DE ANTREPRIZĂ

(Rezumat)

Profesia de constructor presupune atât, sub aspect tehnic cât și sub aspect juridic, o mare responsabilitate din partea celui ce o desfășoară.

Cel chemat să răspundă pentru calitatea și durabilitatea construcției este antreprenorul, indiferent dacă acesta este o persoană fizică sau o persoană juridică. Pentru încheierea unui contract de antrepriză legea prevede ca antreprenorul să posede capacitatea de exercițiu deplină, astfel încât acesta să poată răspunde, din punct de vedere juridic, de toate obligațiile asumate prin acel contract și să suporte eventualele consecințe ce decurg din neexecutarea sau neexecutarea corespunzătoare a lucrărilor de construcții.

Legiuitorul român a elaborat o serie de acte normative pentru domeniul construcțiilor, în care sunt stipulate drepturile, obligațiile, dar și sancțiunile aplicabile în cazul nerespectării acestora. Răspunderea contractuală a antreprenorului este antrenată atât pentru neexecutarea lucrării cât și pentru viciile lucrării și se face potrivit dreptului comun, respectiv clauză penală, daune interese, daune cominatorii.