Introduction to Norwegian legal standards for construction – focus on NS8405

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About Advokatfirma Ræder (1/2)

- 62 lawyers/associates
- 90 + employees
- Full service corporate law firm located in the city center of Oslo
- Extensive experience in construction law - hereunder litigation and arbitration
- Assists some of Norway’s largest companies both on construction law issues and general corporate advice and litigation
- Have long experience in assisting foreign companies in establishing their business in Norway, hereunder with regard to Norwegian tax law regulations
About Advokatfirma Ræder (2/2)

• Assist both builders and contractors

• Our experience includes construction of
  – commercial office buildings
  – large warehouse structures with advanced stock systems
  – renovation projects for large commercial buildings
  – transport and communication projects
  – housing projects
  – foundation works
  – chain of privately owned kindergartens
  – retail buildings
Today’s subject - overview

- Norwegian standard contracts
- Illustrated through NS8405 (general execution contract) and Ns8406
- The basic build up of the contracts
- A quick look at a central topic common to all the contracts – change and change orders
  - Costs
  - Time extension
- The builders contribution
- Minutes of meetings - transfer of liability
The Norwegian standards (NS) for construction – basic principles (1/2)

• Standard contracts used instead of legislation

• Two types of rules
  – Codification of non-statutory construction law (that will apply regardless of the agreement)
  – Provisions governing the relationship between the parties

• Agreed documents between the representatives of the building industry

• Based – largely – on a system where the overall lines can be described through the distribution of liability between the parties (today's topic):
  – Changes
  – Delays and defects in the builders contribution
  – Transfer of liability
The Norwegian standards (NS) for construction – basic principles (2/2)

• Examples
  – Risk of the builder, i.e. typically soil conditions etc.
  – Risk of the contractor, i.e. typically the performance of sub-contractors, adherence to official regulations etc.

• Freedom of contract: The parties are free to modify or remove any regulations in the standard contract
  – Often results in adaptations that shifts the balance of risk and liability
  – Norwegian government builders and also large contractors routinely have major catalogues of changes to the standard contracts
Norwegian standard contracts for construction

• NS 8405 - Norwegian building and civil engineering contract
  – Perhaps the most common standard
  – Execution contract: Prepared to regulate the relationship between a contractor and the client (the builder) where the client provides most of the drawings, descriptions and calculations

• Other standard contracts adapted to the size of the project or the relationship between the involved parties
  – NS 8406 - Simplified Norwegian building and civil engineering contract
  – NS 8407 - General conditions of contract for design and build contracts
  – NS 8415/16 - Similar to 8405/06 but prepared to regulate the relationship between a contractor and a sub-contractor
  – NS 8402/NS 8403 – Standards regulating consultancy contracts
Scope of NS8405

NS 8405.E:2008

Chapter I  Introductory provisions

1 Scope

This standard has been prepared for use in a contractual relationship in which one party (the contractor) undertakes to carry out building or civil engineering work (including installations, new buildings, maintenance, repairs and alterations) for another party (the client), and in which most of the drawings, descriptions and calculations are to be provided by the client.

The standard is suitable for contractual relationships in which the project’s scope or organisation indicates a need for formalised notification rules with strict consequences (preclusion of claims) if notification is omitted, or an extensive duty to coordinate the work with all the other participants in the project. In contractual relationships where, due to the organisation or scope of the project, there are no such needs, NS 8406 Simplified Norwegian Building and Civil Engineering Contract is much more suitable.

The standard has not been prepared for use in subcontractor relationships. Separate contract standards have been prepared for subcontracts.
Contents of a typical Norwegian building and construction contract (1/2)

• Unless otherwise agreed, the below listed documents are normally included as part of a Norwegian building and construction contract

• Regulated in the standard contract itself, see NS8405 section 3.1 (and NS8406 section 4):

  3.1 Contract documents

  Unless otherwise agreed, the following documents are included in the contract:

  a) the contract document if such a document has been established;
  b) any minutes or written materials from clarifying discussions or negotiations held after the tender was submitted and which have been approved by both parties;
  c) the contractor’s tender;
  d) written clarifications and any minutes or written materials from surveys or meetings held before the tender was submitted;
  e) the basis for the tender or the competition;
  f) this standard (NS 8405).
Contents of a typical Norwegian building and construction contract (2/2)

• In NS8405 the documents mentioned are ranked in the previously shown order should the documents contain conflicting descriptions or information (NS8405 section 3.2)

• Regarding tender documentation in section 3 e) descriptions in the tender documents take precedence over drawings in the same document

• Notice that any changes to this regulation is important to contractors:
  – builders often wish to change the order of the documents so that the contractor’s tender is ranked below the basis of the tender or the competition
The basic idea behind the standards

• The general rule is that the distribution of liability follows distribution of functions in the contract.
  – Your function - your responsibility
• If an error occurs on the contractor’s functional area, and therefore is his liability, he has to complete within the contract deadlines and costs to avoid default
• If an error occurs on the builder’s functional area, and therefore is his liability:
  – The contractor is obligated to carry out the work even though the progress is delayed and additional costs incur
  – However; The consequences for the builder is that he is obligated to give the contractor additional time and payment to fulfill his (new/altered) contractual obligations
  – The same basic idea also explains the builder’s opportunity to demand changes in the project
Changes and change orders (1/8)

• One of the most central issues in the NS8405 and related contracts are changes in costs and time which result in change orders (also called variation orders (VO)).
  – Change orders regulated in NS8405 section 22 and 23
  – Time extension regulated in NS8405 section 24
  – Costs regulated in NS8405 section 25

• If the change is initiated by the client:
  – The contractor is not obliged to carry out the changes before he receives a change order (section 22.3.)

• Regular change orders
  – Must be in writing
  – Must give notice that a change is required and what the change involves
  – Must be issued by the builder itself, its representative, or a person with written authorisation to issue change orders
Changes and change orders (2/8)

• The builder may instruct the contractor to make changes (NS 8405 section 22.1). A change is when:
  – The contractor provides something in addition to or instead of the originally agreed performance
  – The performances character, quality, nature or execution is to be altered
  – The agreed performance is to be cancelled

• A change order must be related to what the contract covers and not be of materially different nature to the originally agreed work

• Unless otherwise agreed, the builder cannot order the contractor to make changes that will represent more than a 15% net addition to the contract sum (original contract sum)

• The builder may also order the contractor to accelerate to maintain a time limit subject to a daily penalty charge, or to change the execution to coordinate its work to parallel contractors (section 22.2)
Chapter IV  Changes. Delays and defects in the client’s contribution

22 Changes

22.1 The right to order the contractor to make changes

The client may, by means of a change order, instruct the contractor to make changes.

A change means that the contractor provides something in addition to or instead of the originally agreed performance, that the character, quality, nature or execution of the performance is to be altered, or that the agreed performance is to be cancelled.

A change must be related to what the contract covers and not be of a materially different nature to the originally agreed work. Unless otherwise agreed, the client cannot order the contractor to make changes that will represent more than a 15% net addition to the contract sum.

Deviations with respect to the quantities stated in the contract for items that are to be calculated according to unit rates (adjustable items) do not represent a change pursuant to these provisions unless the deviation significantly exceeds the amount that the contractor ought to have taken into consideration when the contract was entered into.
Changes and change orders (4/8)

- **Change order is issued by builder**
  - Contractor can claim
    1. Coverage of extra costs (section 25)
    2. Time extension (section 24)
  - Conflicts often arise as to amount of cost adjustment and length of time extension

- A variation can also entail a **reduction** of work and time
  - More than 15% reduction – partial cancellation (NS8405 section 38.1)
Changes and change orders (5/8)

• Irregular change orders (section 23.1)
  • An instruction to perform work which is not given in the form of a change order
    – This may be because the client/builder is of the opinion that the work is included in the contract and not subject to a change order

• Duty: The contractor must implement the instruction even though, in the opinion of the contractor, the instruction represents a change, if the instruction either:
  – Has been given by a person who is authorised to issue regular change orders
  or
  – Has been given by a person who is authorised to inspect the contractor’s work
  or
  – Is stipulated in drawings, descriptions, etc. drawn up by the builders project designers
Changes and change orders (6/8)

– The contractor’s duty of notification (section 23.2)
  • If the contractor receives order (not a change order) to perform works that in the contractors opinion represents a change in the contract/ is not included in the contract:
  • The contractor must take immediate steps and notify the builder «without undue delay» of this fact.
    – NS 8406 section 19.3: «within reasonable time»

• Consequences: If the contractor fails to do so, he loses the right to claim that the instruction represents a change (the liability goes over to the contractor)
  (NS8405 section 23.1 first paragraph)
  – Hence the contractor will have:
    » No claim for time extension (risk of daily penalty charges)
    » No claim for coverage of extra costs
  – NB! In NS 8406 lack of notification – on a general basis – will not lead to direct loss of the right to the claim (but see the general doctrine of passivity in section 3)
Changes and change orders (7/8)

– The builder’s duty to respond (section 23.3)
  • When the builder receives notification in accordance with the above mentioned, he shall either issue a regular change order or reject the contractor’s claim
  • If the builder «without undue delay» fails to do so, the contractor’s demand for a change order shall be deemed to have been accepted
    – NS 8406 section 19.3: «within reasonable time»

– The term «without undue delay» and «within reasonable time»
Changes and change orders (8/8)

• Rejection of a request for change - Disputes (section 26.1)
  • If the builder rejects the claim, and the contractor disagree, the contractor has a duty to perform or continue to perform the disputed change.
  • The contractor may demand that the builder provides security for the value of the disputed claim

• The contractor’s legal recourse (section 26.3)
  – If the contractor receive a rejection from the builder, he must either:
    • Demand that the matter is determined by an umpire stipulated in the standard prior to taking over, or
    • Take the necessary steps to start ordinary court- or arbitration proceedings as stipulated in the standard no later than eight months after the taking over of the entire contract work
  – Should the contractor fail to do so, he loses his claim against the builder
Extension of time limits and adjustment of the amount payable (1/3) - right to extension and costs

- The contractor is entitled to an extension of time limits (section 24.1) and/or adjustment of the amount payable (section 25.2) if the progress is prevented or a change is caused by:
  - Changes instructed by the builder
  - Delays or defects in the builders deliverables
  - Other obstacles to the contractor’s performance for which the builder carries the risk

24.1 The contractor’s demand for an extension due to client-related circumstances

The client is entitled to demand an extension of time limits if progress is prevented by

a) changes, cf. clauses 22 and 23, or
b) delays or defects in the client’s deliverables or other contribution as stipulated in clauses 19 and 20, or
c) other obstacles to the contractor’s performance for which the client carries the risk.
Extension of time limits and adjustment of the amount payable (2/3) - notification of the builder

- If the contractor sees that the time schedule will be affected by factors described in section 24.1 he must notify the builder and demand an extension of time limits and/or adjustment in the amount payable «without undue delay».
  - NS 8406: «within reasonable time»

- **Consequence:** The right to demand extension of time limit or adjustment in the amount payable is lost if notification is not made within the deadline

- **Specification of claim:**
  - After the above mentioned notification, the contractor must «without undue delay» provide a detailed and reasoned specification of his demand.
  - Failure to do so by the expiry of the deadline, results in the contractor only being allowed to demand such extension and adjustment in amount payable as the builder «must have understood» that the contractor was entitled to (NS8405 section 24.6 and 25.4)
Extension of time limits and adjustment of the amount payable (3/3) - The builder’s duty to respond

• Builders duty to respond:
  – When the builder receives a demand for an extension of time limits, including a detailed and reasoned specification of the demand, the builder shall respond «without undue delay»
  – The right to object to the demand will be lost if notification of the objection is not put forward by the said deadline

• Both parties are thus subject to formalized notification rules of time-barring character
The builders contribution (functions)

• Composition of the builder’s duty of contribution (section 19)
  – Drawings, descriptions and calculations section 19.2
  «The [builder] is liable for any losses caused by errors, discrepancies and deficiencies or inadequate guidance in contractual documents and drawings, descriptions and calculations that the [builder] has supplied»
  – Physical basis for the work and ground conditions
  – Permanent measurements and building line marks
  – Materials
  – Public permits

• The builder also has certain obligations when it comes to the timing of his contributions, a duty to coordinate his deliveries, etc. (section 20)
Objections to minutes - liability

• Kick-off meeting (section 7.2)
  – Before start of the building work, either of the parties may give notice of a kick-off meeting to clarify and review the parties’ routines
  – Minutes shall be kept of these meetings

• Site meetings (section 7.1)
  – During the period of execution, the parties shall hold regular site meetings
  – Minutes shall be kept of these meetings

• Objections to the minutes
  – Objections to the minutes must be put forward «without undue delay» and not later than the first meeting after the minutes have been received
  – If an objection isn’t put forward in the right time, the party accepts what stated in the minute – even if this involves a change of the agreement, including a change of liability
  – This can not later be invoked as a change which the builder has to pay for
    • No similar rule in NS 8406 – but see section 3
Thank you for your attention!

Contact us at
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