**COORDINATION OF AGREEMENTS IN CONSTRUCTION PROJECTS - USE OF THE "BACK TO BACK" PRINCIPLE**

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**Introduction**

*In almost all construction projects, the contractor enters into agreements with subcontractors, such as electricians, painters, plumbers etc. In lager projects, the use of subcontractors can be quite extensive, and relate to almost every aspect of the construction process. It is in such cases it is not unusual that also the subcontractors enters into agreements with other suppliers in order to be able to fulfill their own contractual obligations. This article focuses on the need for coordination of the agreements on the various levels of a construction project, and the so-called "back to back" principle as a remedy for obtaining this. The intention is to point out both advantages and risks by employing this technique.*

**The need for coordination of agreements**

Even though use of subcontractors is necessary in most construction projects, the complex contract material on different levels may result in extensive and costly consequences for the parties involved. Situations may occur where for instance the contractor must pay liquidated damages to the employer for delays, without being able to pass the costs on to the responsible sub-contractor, or typically, that the contractor's own right to notice of default towards the subcontractor is lost, while the employer has got his right towards the contractor intact. It is therefore imperative that both the contractor and the employer are aware of any critical provisions, and ensure the coordination of these.

Most important for all involved parties, is that the contractual work is performed as painlessly as possible, avoiding burdens which may interfere with the profits that one wishes to obtain from the project. To achieve this, the back to back principle is often used. As this article will show, this is not without challenges.

**What is the back to back principle**

Back to back is often referred to as a clear and unambiguous principle, but this is not necessarily always the case. The principle is often described as a method where the terms of agreement in one step of the contractual pyramid is made a part of the agreement between the parties in the lower steps. In this way one may protect oneself from i.a. critical provisions being left out in a subcontractor agreement, or entering into an agreement which differs from the main agreement due to inaccurate formulations. There are several variants of back to back, of which the two main variants will be described below: Back to back at provision level, and back to back at consequence level. In the following we will give an account of what this entails.

**Back to back at provision level - content and challenges**

Back to back on the provision level is characterized by the implementation of almost the exact provisions and wording of the main agreement into the subcontractor agreement. A typical situation would be that the contractor's agreement with the employer is made a part of the parties' agreement at all levels.

An exact copy of the main agreement would still in most cases be unpractical, and it may result in very unfortunate consequences. In any case, certain conditions must be examined thoroughly by the parties. These will be commented upon in the following.

**1) Scope of work**

If the said method is chosen, a minimum requirement is that the scope of work for the individual participant is agreed separately. This will rarely be regulated by the main agreement, while it naturally constitutes an important condition for an unproblematic working relationship.

**2) Time limits**

A situation which also needs special attention in relation to direct use of the main agreement, is the adaptation of the time limits provisions stated in the main agreement to the subcontract agreement. As stated above, it will e.g. become critical for the contractor if he cannot claim performance from the subcontractor by a deadline which may entail liquidated damages for himself. Also the provisions on notice of default will require a thorough review.

If the main contract contains more approximate deadlines like "without ungrounded delay", "within reasonable time" etc., like e.g. the Norwegian building and civil engineering contract, NS 8405, article 20.5, the parties are often given the necessary free scope. If, however, more specified deadlines have been fixed, there is every reason to be especially attentive. The contractor must protect himself by allowing the subcontractor a shorter period for delivery than he himself has been allowed - and the subcontractor must necessarily in turn allow his subcontractor an even shorter period.

**3) Rights and obligations towards the employer**

It is important that the subcontractor's rights and obligations are in accordance with the contractor's liability to the employer. The subcontractor and the employer have no contractual relationship, and the contractor should therefore be sure to impose on his subcontractor the same obligations that has been imposed on himself. The former building and engineering contract, NS 3430, article 1, contains a straightforward example of how to invert the contract for application to subcontracts by stating that : "*Accordingly the provisions in the Norwegian Standard apply to the main contractor, while provisions regarding the contractor apply to the subcontractor*."

**Back to back at consequence level**

By way of a more consequence oriented use of back to back, provisions entailing the same disadvantages and advantages to the subcontractor as those referring to the contractor are included in the subcontract agreement.

The reason for such consequence oriented regulation is that the contractor wishes to protect himself against any risks which may occur in connection with the subcontract. The subcontractor may e.g. inflict losses on other subcontractors or other third parties. In addition it is important that all obligations assumed by the contractor towards the employer, is passed down the hierarchy. Should a kind of guarantee for work delivered have been agreed, it is important that this is included also in the contractual terms of the subcontract agreement, ensuring that the contractor will not risk an obligation to perform the guarantee work himself.

In short the contract technique implies that the subcontractor is obliged to contribute to the contractor's full performance towards the employer. Provisions on strict and unlimited liability may also be included in order to cover possible liability on the supplier's hand.

Examples of provisions to be included could be "*The sub-contractor is entitled to have additional expenses covered only to the extent that the contractor has such expenses covered by the employer" or "The subcontractor's period allowed for notice of default shall be corresponding to the contractor's period allowed for notice of default to the employer*".

Such regulations bear a risk for the subcontractor. Even if costly or delaying modification work which is not caused by the subcontractor in question should occur, he may risk not receiving settlement or not having the deadline extended. One way of preventing such consequences will of course be to ensure that special provisions on the subcontractors' role in this project are included. This would enable the subcontractor to secure covering of his expenses in case the costs of this project should be increased due to circumstances outside his field of responsibility.

When using a consequence oriented back to back solution it is important to realize that the subcontractor will depend on the contractor's following up towards the employer and his loyal following up of claims of extended deadlines or increased remuneration. It is also important that the contractor updates the subcontractor on meetings, rules on interpretation etc. The contractor will in fact be acting as a sort of administrator to the subcontractor. If the contractor fails to follow this up sufficiently, an absolute consequence oriented back to back solution may result in the subcontractor losing his rights towards the contractor. The subcontractor's risk of loss may be reduced by including particular provisions stating explicitly the scope of the contractor's duty of loyalty.

**Back to back regarding individual contractual relationships - summary**

As shown by the above review, the back to back principle contributes to the streamlining of a project. It will, however, be important to be aware of the risks by uncritical use of this technique. In any case prices, scope of work and deadlines must be agreed separately for each case, and in general one should pay special attention to circumstances related to these issues. The back to back principle may well be used at a regulation or consequence level in order to supplement each other or generally to supplement other contractual provisions.

By way of summing up it could be said that the most important issue for all parties is to be aware of what a back to back regulation may entail in each individual case and to take this into account when estimating the contract price etc.

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