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The Scope of Work According to AB 04

2020-21 NR 4

SÄRTRYCK UR JURIDISK TIDSKRIFT

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1. Introduction

One of the most important parts of a construction agreement is the part(s) where the scope of work is being defined. This is because the scope of work will outline what each party has to perform and be liable for under the agreement. Practically, the scope of work will determine which labour, goods, materials, equipment, services, etc. the contractor is obliged to perform under the agreement and, likewise, which remuneration the employer is obliged to pay.

Consequently, the contractor is not forced to perform works beyond the scope of Contract Works without receiving additional payment. Likewise, the employer is not forced to compensate the contractor beyond the agreed Contract Sum, if the contractor claims additional payment for undertakings that are included in the scope of Contract Works.[1]

Uncertainty regarding the scope of work harms the possibility of calculating tenders without guesswork (which, in turn, harms comparability of tenders) and increases the risk for cost overruns and disputes.

What applies according to the Swedish standard form agreement AB 04[2], regarding the scope of work? What types of works, from a legal perspective,

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[1] Especially important if the contractor is rewarded under a lump sum contract.

[2] AB 04 is used for design-bid-build contracts ("construct only contracts") where the employer is responsible for the design and the contractor for the execution of the object and ABT 06 is instead used for design-build contracts ("turnkey contracts") where the contractor is responsible for both the design and the execution of the object.

Since the early 20th century, standard forms of contract have been used in the Swedish construction industry. In the absence of directly applicable legislation governing construction contracts between business entities, the standard forms, "AB agreements", published and administered by BKK (The Construction Contracts Committee, and prior to BKK, by Svenska Teknologföreningen), function as a sort of general code for the construction industry.

However, it should be noted, despite the widespread usage of AB agreements, that the standard forms are not considered to have reached the status of commercial practice. Thus, the terms

could a contractor perform under AB 04[3], and how do these "types of works" relate to each other?

This article examines these questions. The assessment is being made from a starting point where the thesis is that fundamentally there are, according to AB 04, five ("legally defined") categories of works[4] that a contractor could execute under a construction contract governed by AB 04:

i. Contract Works,
ii. Temporary Works,
iii. Detail Works (Chapter 1 § 1 paragraph 2),
iv. Alterations and Additions – "ÄTA-Works",
v. Rectification Works.

By examining these types of works in the light of AB 04's provisions, hopefully the legal framework regarding the scope of work will be laid out properly.

Since defining the scope of work is an exercise which is not exclusively confined to legal practitioners, and we are seeing an increase of foreign contractors and employers in Sweden, I have found it suitable to write this article regarding Swedish construction law in English.

2. The Contract Works

The concept "Contract Works" is defined in AB 04's "definitions and notes"[5] as:

"the works which, according to the Contract Documents, are included in the Contractor's undertaking."

The Contract Works are therefore directly linked with the Contract Documents, which are defined as:

of standard form agreements must be incorporated in each individual agreement in order to form part of the agreement.

3 Depending on which project delivery method is used, the scope of work will, of course, vary. However, essentially AB 04 and ABT 06 concur and thus this article, which is written on the basis of a construction contract where AB 04 is applicable, may serve as guidance at least in part for turnkey contracts (ABT 06) as well.

4 The AB 04's "definitions and notes" section provides that a Work is: "labour, Facilities, materials and goods. Labour also includes the handling of materials and goods".

5 When referring to the English wording of AB 04 throughout this article, I use the translation of AB 04 published by BKK, unless otherwise stated.

"the Contract[6] together with the documents which are attached thereto or which are referred to in any of these as applicable to the Contract Works"[7].

This connection is stated explicitly in Chapter 1 § 1 paragraph 1:

"The Scope of the Contract Works is determined by the Contract Documents."

Consequently, the Contract Works are outlined through evaluating the Contract Documents, or in case of ambiguities, by interpreting the Contract Documents. Defining the Contract Works in a specific project is crucial from several aspects[8], but especially since the works regarded as "Contract Works":

- *will be covered by the Contract Price*[9]
  This is especially important if the Parties' contract is, in whole or in part, a "fixed price contract". This is because the contractor, as a main rule[10], is not entitled to subsequently claim further compensation for costs regarding Contract Works that the contractor has failed to calculate remuneration for within the offered Contract Price.[11] If the contractor is instead being compensated according to the prime cost principle[12] (Chapter 6 §§ 9–10), the distinction between Contract Works and Alterations and Additions is, however, not as

[6] "document signed by the parties and showing their agreement." according to the AB 04's "definitions and notes".

[7] If the parties have not prepared a Contract, those documents that show the agreement of the parties are to be regarded as Contract Documents.

[8] In addition to the two aspects below, the definition of Contract works will moreover affect, *inter alia*, which period of limitation that shall apply (Chapter 6 § 4 paragraph 2 and Chapter 6 § 19 paragraph 2), which work that the contractor is required to perform under the contract (affects the definition of Alterations and Additions, see more below under heading "Alterations and Additions – "ÄTA-Works"") etc.

[9] This is because the Contract Price refers to payment for the Contract Works, Chapter 6 § 1. "Contract Price: the payment for the Contract Works specified in the Contract Documents, exclusive of value added tax." according to the AB 04's "definitions and notes".

[10] Unless the calculation provisions in AB 04 give the contractor right to do this with reference to Chapter 1 § 4. Further, the contractor may receive additional compensation if the contractor's cost for performing Contract Works is increased due to certain circumstances of a force-majeure character, see Chapter 1 § 13 paragraph 3 regarding costs due to "Statutes becoming effective after the submission of the tender" and Chapter 6 § 3 regarding costs due to "the official action, by war or other crisis situation with similar effect". Moreover, Chapter 6 § 5 "Substantial disruption" provides that the contractor may claim additional compensation if the contractor's costs for performing Contract Works have been increased due to the fact that Alterations and Additions or the alternation of a, in the Contract Documents, specified quantity occasion a substantial disruption of the conditions for the execution of the Total Works.

However, it should be noted that all of the aforementioned provisions include specific conditions that must be satisfied in order to make the provisions applicable.

[11] However, it should be noted that Contract Works performed under acceleration, if the employer is liable for the acceleration, shall be further compensated (Chapter 4 § 6).

[12] Cost plus a fixed fee for overheads and profit.

vital (from a reimbursement perspective). Nevertheless, it is not unusual that the fixed fee in these contracts is set higher for Alterations and Additions than for Contract Works.

- *will be covered by the Contract Period*[13]
  This is vital since the contractor, other than pursuant the provisions regarding hindrances[14], is only entitled to a time extension to the extent that Alterations or Additions, not Contract Works, affect the possibility of complying with the Contract Period (Chapter 4 § 2 paragraph 1). It is particularly important, if the parties have agreed, which they most commonly do, that the employer is entitled to claim liquidated damages from the contractor in case of delay.

When the scope of the Contract Works is being determined, AB 04 states that:

"The Contract Documents are mutually complementary unless the circumstances give occasion for another procedure." (Chapter 1 § 2.)

This means that work, which shall be included in the contractor's undertaking, only needs to be specified in one place in the Contract Documents. However, according to the commentary text relating to Chapter 1 § 2, the rule is only valid if the Contract Documents have been drafted in accordance with recognised good practice; information should be comprised in "expected" Contract Documents in an "expected way," etc. Moreover, the commentary text emphasises that the co-ordination of different Contract Documents between different technical areas is the employer's responsibility.

Further, AB 04 provides specific rules that are to be applied if different kinds of Contract Documents give rise to discrepancies, or if discrepancies are found in any one, or group, of Contract Documents.

If different kinds of Contract Documents give rise to discrepancies, Chapter 1 § 3 provides that their relative priority shall be as stated in Chapter 1 § 3[15] (although in practice the order of priority is frequently amended from agreement to agreement).[16] However, in the event of a discrepancy between quantities in

[13] "Contract Period: time specified in the Contract Documents for the execution of the Contract Works or a Main Section thereof." according to the AB 04's "definitions and notes".

[14] Chapter 4 § 3.

[15] It should be noted that this order of precedence clause is based on traditional, "paper-based", design documentation. If the parties instead wish to use BIM throughout the project, this provision (alongside several others), may need to be amended and customised accordingly.

[16] Unless the circumstances give occasion for another procedure.

a Schedule of Quantities[17] and information elsewhere in the Basis for Tender[18], the scope of the Contract Works shall be determined to be the quantity shown in the Schedule of Quantities (Chapter 1 § 3 paragraph 2).

If instead the discrepancies are found in any one of the Contract Documents[19], or in any one group of documents[20], the information or stipulation shall apply which involves the least expense to the contractor (Chapter 1 § 4).[21] Further, Chapter 1 § 5 provides that measurements which are given in figures or letters, which are not manifestly incorrect, shall take precedence over scaled measurements.

If ambiguities cannot be resolved through the interpretation guidance provided in AB 04 Chapter 1, as described above, the interpretation must instead be made according to several interpretation methods and principles under Swedish contract law.

It should be noted in this context that interpretation of ambiguities arising from the AB agreements in particular has been considered by the Swedish Supreme Court in several judgments over the last ten years. For instance, in case NJA 2015 s. 862, 3 December 2015, the Supreme Court, at para 12, stated[22]:

"The Supreme Court has in several judgments the last years had reason to apply the AB and ABT agreements and in these judgments made statements regarding principles for the interpretation of ambiguous provisions in these standard forms of contract. The Supreme Court has, *inter alia*, held the following. If no common intention of the parties is found and there are no circumstances beside the wording of the agreement that may clarify how the parties understood the provision in dispute, the starting point for the interpretation should be the wording of the provision. When the meaning of the provision is tobe determined, the nature, structure and overall purpose of the contract, as well as other provisions contained therein may serve as guidance; the provisions are intended to form a coherent system. When interpreting some provisions, it may be especially important to take the construction agreement's distinctiveness into consideration. If the structure does not provide any guidance for interpretation, it is therefore natural to interpret the provision in the light of the non-mandatory law that otherwise would govern the agreement, of which part is expressed in the Sale of Goods Act. However, it should be noted that construction agreements are, in some ways, distinct in relation to, e.g. a purchase agreement since construction agreements usually cover vast, complicated and long-term work that involves several parties. Thus, lastly the reasonableness of the interpretation provided must be determined. (See, *inter alia*, "NJA 2013 s. 271" p. 7 and "NJA 2014 s. 960" p. 23.)[23]

[17] AB 04's "definitions and notes" section provides that a Schedule of Quantities is: "list of quantities of different kinds, with or without description of execution, function or quality. A schedule of quantities may for example contain quantities of e.g. performance, facilities, materials or goods.".

[18] AB 04's "definitions and notes" section provides that a Basis for Tender is: "the documents which the Employer supplies for preparation of tenders".

[19] For example, p. 10 in a Contract Document says one thing and p. 17 another.

[20] For example, one drawing specifies the provision of four streetlights and another one three.

[21] Unless the circumstances manifestly give rise to another procedure.

[22] The author's translation.

[23] (Sw.) "12. HD har i flera avgöranden under senare år haft anledning att tillämpa AB- och ABT-avtalen och då uttalat sig rörande principer för tolkning av villkor i dessa avtal. Domstolen

Since construction agreements between business entities are not governed by a "special construction law" and e.g. the Sale of Goods Act is not directly applicable, it is nevertheless difficult to know exactly what non-mandatory law would[24] otherwise be applicable. Consequently, disputes regarding the interpretation of ambiguities in a construction agreement, ambiguities that cannot be (easily) interpreted using the parties' agreement or the applicable AB agreement (if any), can be particularly risky and unpredictable.

Lastly, it should also be noted that Chapter 1 § 13 provides that the contractor shall be responsible for the observance of statutes[25] to the extent that they affect the contractor's undertaking.[26] Chapter 1 §§ 10 and 12[27] regarding permits, notices and necessary agreements with authorities, as well as Chapter 5 § 22 regarding insurance cover, may be noted in this context as well. Through reference in Administrative Instructions[28] (Sw. "*AF-delen*") to "*Guidance for the preparation of particular conditions for Building and Civil Engineering Works and Building Services Contracts*" (AMA AF), these undertakings are described in further detail.[29] All these provisions and references also affect, to a greater or lesser extent, the scope of the Contract Works for the contractor.

har framhållit bl.a. följande. Om någon gemensam partsavsikt inte kan anses föreligga och det inte heller finns några omständigheter vid sidan av avtalstexten som kan klargöra hur parterna uppfattade ett omtvistat standardvillkor, bör tolkningen inriktas på villkorets ordalydelse. När villkorets innebörd ska bedömas kan ledning hämtas från systematiken och de övriga villkoren i avtalet; bestämmelserna är avsedda att utgöra ett sammanhängande system. Vid tolkningen av vissa villkor kan det finnas anledning att särskilt beakta entreprenadavtalets speciella drag. När inte heller avtalets systematik ger någon ledning är det därför naturligt att tolka villkoren i ljuset av den dispositiva rätt som annars skulle ha tillämpats, varav en del kommit till uttryck i köplagen. Det ska dock beaktas att entreprenadavtal skiljer sig från t.ex. köp genom att det som regel avser ett omfattande, komplicerat och långsiktigt arbete med flera inblandade parter. Ytterst och sist måste en mer övergripande rimlighetsbedömning göras. (Se bl.a. NJA 2013 s. 271 p. 7 och NJA 2014 s. 960 p. 23.".

24 If, e.g. the parties had not agreed that a AB agreement should govern the parties' contract.

25 This covers, inter alia, legislation concerning labour, health, safety and environmental matters.

26 Chapter 2 § 1 paragraph 2, "the Total Works shall be executed in a professional manner" (this does not limit the Employer's liability under Chapter 1 § 6), may be noted here as well since a determination of what "professional manner" is could include a review of what certain quality-assurance reference frameworks state, such as technical AMA's (General material and workmanship specifications) etc. These are not statutes per se, but they may nevertheless affect the scope of work to a greater or lesser extent.

27 Along with relevant sections and codes in the Administrative Instructions (AFC/AFD.17 and 18).

28 The Administrative Instructions is a specific Contract Document which is linked to AB/ABT and it contains partly provisions ("codes") of a legal character that describe the parties' relation, and partly provisions that describe the conditions for the execution of the object which is the subject of the parties' agreement. The Administrative Instructions concur with AMA AF, and by linking to AMA AF in the Administrative Instructions, reference is made to the permanent texts in AMA AF.

29 See, e.g. code AFC.185 regarding CE marking and AFC.343 regarding Compulsory ID and Attendance Reporting on the Construction Site, ID 06 (for AFC.343, GDPR affects the under-

3. Temporary Works

The contractor's scope of work not only covers the execution of Contract Works *per se*, but also certain works of a temporary nature that the contractor must undertake to be able to perform the Contract Works in a proper way; in other words, incidental works that allow the contractor to perform the Contract Works and which will be removed when the Contract Works are finished. The nature of temporary works differs from project to project but it could include work such as:

– certain earthworks, e.g. trenches, excavations, temporary slopes, etc.,
– work with certain equipment/plant foundations, e.g. crane supports (design and construction of a base upon which the crane, normally a tower crane, will be erected),
– work with certain structures, e.g. formwork, falsework, facade retention, scaffolding, site fencing, etc.

The concept "temporary works" is not, however, defined in AB 04's "definitions and notes" section, although the narrower concept of "Facilities"[30] is defined as:

"Appliances required for the execution of the Total Works[31] and transport. For example, plant, implements, scaffolding, site accommodation, formwork and instruments."

When the concept "Facilities" is read alongside the definition of "Work", it is clear that no labour is included in the concept of "Facilities":

"*Work*: labour, Facilities, materials and goods. Labour also includes the handling of materials and goods."

This differs from the nature of temporary works which include labour as well; see, e.g. the Fidic 1999 Red Book's[32] definition of temporary works:

taking), and Appendix 1 "BKK's specification of minimum cover for all risk insurance and liability insurance for construction projects".

30 Sw. "Hjälpmedel", which, in my opinion, should be more accurately translated as "Equipment".

31 AB 04's "definitions and notes" section provides that the Total Works is: "the Contract Works together with any Alterations and Additions."

32 Conditions of Contract for Construction.

"1.1.5.7 "Temporary Works" means all temporary works of every kind (other than Contractor's Equipment[33]) required on Site for the execution and completion of the Permanent Works[34] and the remedying of any defects."

Consequently, AB 04 does not provide a specific definition of "temporary works". Instead AB 04 provides that a temporary work is a "Work"[35], if it includes labour; otherwise it could be covered by the definition of "Facilities".

Accordingly, the aforesaid thereby entails that "temporary works" according to AB 04 is a "Work" for which the contractor is either remunerated through the "Contract Price", or the compensation paid when carrying out "Alterations and Additions". When read alongside Chapter 1 § 9 paragraph 2[36], "*The Contractor shall at his own expense procure all that is needed for the execution of the Total Works*,"[37] this means that the contractor has to calculate with certain temporary works, and price these before submitting a tender and discussing the form of remuneration. This applies to the pricing of both Contract Works and Alterations and Additions. Since temporary works are either Contract Works or Alterations and Additions, lastly the AB 04's rules regarding the "scope of Contract Works", as discussed above, will determine whether the contractor is entitled to claim additional compensation for executed temporary works or not.[38]

[33] 1.1.5.1 "Contractor's Equipment" means, according to Fidic 1999 Red Book, all apparatus, machinery, vehicles and other things required for the execution and completion of the Works and the remedying of any defects. However, Contractor's Equipment excludes Temporary Works, Employer's Equipment (if any), Plant, Materials and any other things intended to form or forming part of the Permanent Works.

[34] 1.1.5.4 "Permanent Works" means, according to Fidic 1999 Red Book, the permanent works to be executed by the Contractor under the Contract.

[35] However, AMA AF 12 (which concurs with the Administrative Instructions) has a code (clause) AFG, with the heading "General Works and Construction Aids" (Sw. Allmänna arbeten och hjälpmedel), where the term "Allmänna arbeten" addresses temporary works which include labour, although the translated version uses the term "general work" instead. This concept, i.e. "Allmänna arbeten", is used in AB 04 Chapter 3 § 10, although it is not defined. Moreover, General Conditions of Sub-Contract AB-U 07 also addresses "Allmänna arbeten" in § 26.

[36] This is confirmed in AMA AF 12 since code (clause) AFG which regulates temporary works provides a general rule stating that "The Contractor shall provide, at his own expense, necessary general work for his own contract, unless otherwise stated in this section".

[37] As regards "Setting out" (Sw. Utsättning), Chapter 2 § 14 explicit states that "The Contractor shall carry out and pay the cost of such Setting-Out as is not to be done by the Employer", referring to Chapter 2 § 13.

[38] Temporary works that the contractor contends are not covered by the Contract Price. For instance, in this context the Administrative Instructions' section AFG could be of special importance since it prescribes that amendments from the general rule, "The Contractor shall provide, at his own expense, necessary general work for his own contract" should be stated in this section.

4. Detail Works (Chapter 1 § 1 paragraph 2)

While Chapter 1 § 1 paragraph 1 states that "*The Scope of the Contract Works is determined by the Contract Documents*", paragraph 2 nevertheless provides that:

"The Contract Works also comprise such detail work as – without being specifically prescribed in the Contract Documents – is manifestly intended to be carried out without any addition to the Contract Price."

However, since the paragraph states that the (detail) work should be "*manifestly intended*" to be carried out "*without any addition to the Contract Price*", the burden of proof is set above the otherwise commonly used burden of proof "shown" (Sw. "*styrkt*")[39]. Consequently, this is an onerous burden for an employer who is alleging[40] that a specific work that has not been specifically prescribed in the Contract Documents should be carried out by the contractor without any additional payment. Thus, the kinds of works that are covered by the provision are often of low value and disputes arising out of the provision are unusual.[41]

5. Alterations and Additions – "ÄTA-Works"

In the Swedish version of AB 04 the term "*ÄTA-arbete*" ("ÄTA-work") is contained in the definitions and notes section. The concept stands for:

Alterations (Sw. ***Ä**ndringsarbete*), Additions (Sw. ***T**illägsarbete*) directly connected with the Contract Works and not essentially different in nature from these, together with work to be deducted ("Omission", Sw. ***A**vgående arbete*).[42]

[39] This is the burden of proof usually applied in civil proceedings, a bit above 'the balance of probabilities', but below 'beyond reasonable doubt'. The latter is generally used in criminal proceedings.

[40] And who thus bears the burden of proof, since the general rule is that the party who is alleging a specific fact is also required to prove its assertions. However, there may be situations where the burden of proof should be reversed, for instance if substantive law so requires or if only one of the parties has access to the evidence which is relevant.

[41] This provision may not disrupt the economic balance that the agreement is based on, according to the official commendatory text ("Motiv AB 72",), see p. 46 (1988, second edition), published along with AB 72, which is a predecessor to AB 04. The wording of the provision is unchanged in AB 04 in relation to AB 72, and Motiv AB 72 is still being used since no official commendatory text has been published.

[42] The wording used in the English version of AB 04 is "Alterations and Additions: Alterations and Additions directly connected with the Contract Works and not essentially different in nature from these, together with work to be deducted."

Consequently, the definition of Alterations and Additions provides two conditions that a work must meet to be considered an Alteration or Addition. The work must be: (i) directly connected with and (ii) not essentially different in nature from the Contract Works. Thus, the Contract Works affect which kinds of works that could form Alterations and Additions in a specific project; in other words, the scope of the Contract Works defines the scope of possible Alterations and Additions. This means that, e.g., the same small bridge could be considered as an Addition in one infrastructure project and not in another, depending on several factors (if, e.g., there are three [other] bridges included in the Contract Works in one project and none in the other, etc.).[43]

AB 04 separates two different categories of Alterations and Additions: (i) Alterations and Additions instructed by the employer "Instructed Alterations and Additions" (Chapter 2 § 3) and (ii) works that shall be considered equivalent to these "Works Equivalent to Alterations and Additions[44]" (Chapter 2 § 4).

It may be noted in this context that Chapter 6 §§ 1 and 14 provides that the Contractor is entitled to additional payment for executed Alterations and Additions, and, likewise, that the Employer may deduct amounts due to Omissions. In addition, Chapter 6 §§ 6 and 7, along with the Contract Documents, provides which form of remuneration that shall be used when determining the compensation.

5.1 Instructed Alterations and Additions (Chapter 2 § 3)

If a work is (i) directly connected with and (ii) not essentially different in nature from the Contract Works, Chapter 2 § 3 provides that the employer is entitled[45] to require the contractor to execute the work, otherwise not. This is regardless of whether the work is an Addition or an Alteration. An Alteration usually means that there is a Contract Work that the employer wishes to alter, hence new work is prescribed at the same time that – at least some – Contract Work is being deducted.

Furthermore, Chapter 2 § 3 provides that the contractor is entitled to carry out work that meets these conditions. If the employer appoints another contractor to perform these works, or perform them itself, Chapter 6 § 2 states that the

[43] It may be noted that neither a changed amount of work resulting from: (i) the Contractor's manner of executing (if not ordered by the employer); or (ii) modifications of details required by an inspecting authority when examining documents provided by the Contractor, shall be regarded as Alterations or Additions under AB 04 (Chapter 2 § 5).

[44] Another way of describing it: "Works that shall be deemed as Alterations and Additions".

[45] Unless otherwise prescribed by statute and the work is ordered during the Time for Completion; if a work is ordered after the Time for Completion, regardless if it is: (i) directly connected with; and (ii) not essentially different in nature from the Contract Works, the employer may not require the contractor to perform it under the agreement as an Alteration or Addition.

employer shall pay to the contractor the amount of any loss of profit and/or other costs sustained by the contractor as a result of this engagement.

Chapter 2 § 3 covers the situation where the employer instructs the contractor to perform Alterations and Additions, and Chapter 2 § 6 states that such work shall be ordered in writing before the contractor starts to perform the work. However, if the employer submits a document containing Alterations or Additions (Chapter 2 § 6) or if work is being ordered at a site meeting/initial meeting and a note is being made in the minutes (Chapter 3 §§ 2–3), then the requirement for a written order is satisfied.

If the contractor carries out Alterations and Additions that, e.g. may have been instructed orally, Chapter 2 § 8 provides that the general rule is that the contractor is not entitled to additional payment over and above the Contract Price. However, there is an exception in the same provision which provides in classically legal terms "*unless such a consequence would be unreasonable*". Accordingly, it is difficult to give guidance regarding when Chapter 2 § 8 is applicable and the fact that the Supreme Court has not adjudicated the issue hardly makes it any easier.[46] Some guidance is, nevertheless, provided through the commentary text, which is found under the provision in AB 04.[47]

However, it should be noted that AB 04's provisions, as well as other Contract Documents of course, may be altered and adjusted by the parties during the execution of works. Moreover, Swedish contract law provides that such modifications to an existing agreement may be made through party conduct. This means that if, e.g. an employer has repeatedly confirmed and paid Alterations or Additions that have not been notified accordingly under AB 04, "under the parties' written contract", the employer may, in case of dispute, have forfeited its right to reject contentious Alterations or Additions on the ground that these

[46] However, it may be noted that in one recent case T 4889-17, 12 April 2019, the Court of Appeal for Western Sweden stated that (my free translation) "It has not been shown that the contractor has been prevented in any way from complying with the provisions regarding Alterations or Additions in AB 04, hence an outcome where the right to additional payment is being rejected on these grounds could not be found unreasonable according to Chapter 2 § 8.".

(Sw. Det har inte framkommit att det förelegat något hinder för BH Markentreprenad att följa bestämmelserna om ÄTA-arbeten i AB 04. Att BH Markentreprenad inte erhåller ersättning för dessa krav kan därför inte heller anses oskäligt enligt AB 04 kap. 2 § 8.")

[47] Extract from the commentary text in the English version of AB 04.

"The exception provision "unless such a consequence would be unreasonable", in § 8 will for example become applicable if the Employer does not give notice without delay or states that he does not share the Contractor's opinion that the work represents Alterations and Additions. If the Contractor nevertheless does the work and the Contractor's view proves correct, the Contractor shall receive payment.".

Further, the commentary text provides that the exception clause may also become applicable both when the Contractor during the course of the actual work discovers and reports that the work concerned or a part thereof has been occasioned by circumstances intended in § 4, and when immediate action has to be taken and the Contractor has no possibility of giving notice or awaiting an order before the work is done.

Alterations or Additions "have not been notified accordingly by the contractor".[48] This argument does not, however, formally rely on Chapter 2 § 8, but instead that agreed notification provisions are no longer in force (or have been amended) as a result of the parties' conduct.

5.2 Works Equivalent to Alterations and Additions (Chapter 2 § 4)

Almost all construction projects will inevitably depart from the design and/or specifications provided in the tender documents due to, e.g. differing site conditions (in relation to what the tender documents stated and/or to what the contractor reasonable could expect) or the fact that specified materials and/or working methodology could not be used for some reason, etc.

In order to allocate the risk in a construction project properly, Chapter 2 § 4 in AB 04 lists three situations when the contractor is entitled to classify works that are not Contract Works as works "equivalent to Alterations and Additions". For these works, the contractor is thus entitled to additional payment and, if necessary, a time extension[49].

Chapter 2 § 4 provides that if works occurs due to the fact:

(i) that data according to Chapter 1 § 6, for which the employer is responsible, are not correct,
(ii) that the Site or other circumstances of importance differ from what is to be assumed under Chapter 1 § 7, or
(iii) that circumstances referred to in Chapter 1 § 8 are not such as they should be assumed to be,

then the works shall be considered equivalent to Alterations and Additions prescribed by the employer.

5.2.1 (i) "that data according to Chapter 1 § 6, for which the Employer is responsible, are not correct"

The first situation covers the case when works need to be carried out, when the contractor incurs increased costs, due to incorrectness in data, investigations, technical solutions or setting-out that the employer has provided the contractor with, and it refers to Chapter 1 § 6 which states that:

"Responsibility for the correctness of data, results of investigations and technical solutions rests which the party providing them. The same applies to Setting-Out provided by one of the parties.

[48] See, for instance, case T 6895-17, p. 5–6, 23 November 2018, Svea Court of Appeal.
[49] According to Chapter 4 § 2 paragraph 1.

The approval of the other party does not limit responsibility under the previous clause.

The Employer is assumed to have given in the Basis for Tender the information which can be obtained from professional inspection of the property or part of the property affected by the Contract Works."

In a construction agreement governed by AB 04, the employer usually provides the majority of, *inter alia*, the design documentation. Thus, the liability for works occurring due to, e.g. incorrectness in these documents, rests on the employer ("*the party providing…*") according to Chapter 1 § 6 and 2 § 4. It should, however, be noted that the responsibility provided in Chapter 1 § 6 is applicable regardless of whether the contract is a design-build contract where ABT is applicable or a design-bid-build governed by AB.[50]

In addition, Chapter 1 § 6 paragraph 3 is of particular importance in relation to Chapter 2 § 4. Chapter 1 § 6 paragraph 3 provides that:

"The Employer is assumed[51] to have given in the Basis for Tender the information which can be obtained from professional inspection of the property or part of the property affected by the Contract Works."

AB 04 does not require the employer to carry out and submit professional inspections of the site and/or the object before making the Basis for Tender. However, when the contractor examines documents, information (data), that the employer has made available, e.g. a report containing information regarding sub-surface conditions, Chapter 1 § 6 paragraph 3 provides that the contractor is entitled to assume that the information is of a certain quality; that the same information as disclosed would be provided if a professional inspection of the property had been made.

The same applies where information is not provided, e.g. if the Basis for Tender does not provide that there is asbestos on the property, the contractor is entitled to assume the following: "if there is asbestos on the property, a professional inspector would have noticed it when examining the property, and since the Basis for Tender shall contain the information which can be obtained from a professional inspection, the lack of information concerning asbestos must mean that there is none. Hence, asbestos removal is not a part of the Contract Works".[52]

[50] This is especially clear since the Supreme Court in case NJA 2009 p. 388, 12 June 2009 held that the contractor was responsible for the adequacy of a construction provided by the contractor under a performance contract governed by AB.

[51] In my opinion, the word "deemed" is a better description of the essence of the Swedish provision than "assume".

[52] Example taken from Commentary on Chapter 1 §§ 6 and 7:

"The Contractor's inspection will cover only such information about conditions as can be obtained by visiting the place. The Contractor does not have a duty to carry out any dismantling, destruction or soil investigations.

The Contractor has at the tendering stage a right to assume that the Employer's design and planning is based on a professional examination of the property or part of the property affected

It should be noted that to assess exactly what kind of information that is covered by Chapter 1 § 6 paragraph 3 can prove to be a complex exercise which must be performed on a case-by-case basis depending on, e.g. what kinds of Contract Works that the Basis for Tender comprises. As to the concept of "professional" (Sw. *fackmässig*), AB 04 does not provide any details regarding the exact "level of professionalism" covered by the assumption in the provision.

However, when the same[53] concept is used in Chapter 1 § 8 (see more about that provision below), Motiv 72 provides that "the action shall be objective and based on the knowledge of a professional"[54] and mentions that an assessment "reasonably should be based on the knowledge of a normal/regular cautious professional"[55]. Moreover, Samuelsson suggests that the concept is defined by what is considered as average professional knowledge and abilities, rather than the knowledge and abilities possessed by a top of the line professional.[56] This interpretation is in line with the one provided by BKK.[57]

Lastly, it should be noted that it has been suggested that the wording of Chapter 2 § 4 "*that data according to Chapter 1 § 6, for which the Employer is responsible, are not correct*" could mean that the employer is only liable under Chapter 2 § 4 for data provided, not for data "not provided".[58] However, the opposite suggestion has been provided as well.[59] In my opinion, the latter interpretation is likely the correct one. Chapter 2 § 4 along with Chapter 1 § 6 paragraph 3 is intended to encourage employers to submit proper Basis for Tenders. A state of affairs whereby an employer could not be held liable under Chapter 2 § 4 for data "not provided" (but that should have been provided if a professional inspection of the property had been made accordingly), would

by the Contract Works. For example, the Contractor has a right to assume that there is no asbestos and that asbestos removal is therefore not a part of the Contract Works if this has not been stipulated in the Basis for Tender."

53 In the Swedish version the word "fackmässig" is used in both Chapter 1 § 6 and 8 and Chapter 2 § 1. However, in the English version the word "professional" is used in Chapter 1 § 6 and 2 § 1 and instead the word "expert" in Chapter 1 § 8; why this discrepancy is found in the English version is unclear.

54 Motiv AB 72, see p. 70, my free translation, (Sw. Bedömandet skall ske fackmässigt, vilket innebär att det skall vara objektivt och grundat på de kunskaper en fackman besitter).

55 My free translation. Ibid. p. 70 (Sw. "[T]rots att tillämpningen rimligen borde ske mot bakgrund av vad en normalt aktsam fackman haft anledning förutsätta"…).

56 Per Samuelsson, AB 04 En kommentar, p. 91. (2020).

57 BKK, The Construction Contracts Committee, filed an amicus submission to the Supreme Court within the scope of the judgment in NJA 2015 s. 3, 27 January 2015, where BKK, *inter alia*, elaborated on the word "fackmässig". BKK suggested that the concept "fackmässighet" means that an action should be made "based on the knowledge that a reasonably ("normally") experienced professional, within concerned area of expertise, is expected to possess". (Sw. "baserat på de kunskaper en normalt erfaren fackman inom berört område kan förväntas besitta."). See para 15 in the judgment.

58 Anders Ingvarsson and Marcus Utterström, Tolkning av entreprenadavtal, p. 174–175. (2020).

59 Per Samuelsson, AB 04 En kommentar, p. 84. (2020).

be in contravention of this purpose and harm a fair risk allocation between the contractor and the employer.[60]

5.2.2 (ii) "that the Site or other circumstances of importance differ from what is to be assumed under Chapter 1 § 7" and (iii) "that circumstances referred to in Chapter 1 § 8 are not such as they should be assumed to be"

The second and third situation covers the case where the contractor has to perform additional/altered work or incurs increased costs due to the fact that either:

(i) the site or other circumstances of importance turned out to be other than the contractor had to assume under Chapter 1 § 7, or
(ii) that circumstances referred to in Chapter 1 § 8 are not such as they should be assumed to be.

The second situation refers to Chapter 1 § 7 which states that:

"Before submitting his tender the Contractor is assumed to have obtained the knowledge of the Site and of other circumstances of importance to an assessment of what is required for the execution of the Contract Works that can be gained by visiting the place. This does not limit the Employer's responsibility under § 6 of this Chapter.

The Site shall be assumed at the time of being taken over by the Contractor to be in the same state as when the Contractor submitted his tender. If other work is to be carried out on the Site before the commencement of the Total Works, the Site shall be assumed at the time of being taken over by the Contractor to be in the same state as it could be assumed to have been after the execution of that work."

Similar to Chapter 1 § 6, Chapter 1 § 7 does not impose a requirement on the contractor to visit the site, the place of the object, before submitting a tender. However, Chapter 1 § 7 paragraph 1 provides that the contractor is assumed (deemed) to have obtained the knowledge[61] of the Site, and of other circumstances of importance, to an assessment of what is required for the execution of the Contract Works.

Chapter 1 § 7 should be read together with Chapter 1 § 9 paragraph 2 which states that:

"The Contractor shall at his own expense procure all that is needed for the execution of the Total Works."

[60] Supreme Court's judgment NJA 2015 p. 3, 27 January 2015, para 10, may support this interpretation. Para 8 in the suggested ruling (Sw. betänkandet), however, explicitly mentions such order.

[61] "that can be gained by visiting the place", basically, by doing a visual inspection.

The words "all that is needed" comprises, *inter alia*, personnel, goods, equipment, consumables, services, whether of a temporary or permanent nature, required for the execution, the completion as well as the remedying of any defects[62], of the Total Works. Due to this provision, it is important that the contractor identifies the scope of work, including necessary temporary works, before a price is offered and a tender submitted. This is especially important if the employer requests the contractor to offer a fixed price for the execution of the works. However, if the employer instead suggests that the contractor should be paid according to the prime cost principle (Chapter 6 §§ 9–10), the contractor still needs to perform a similar exercise before the contractor proposes the fixed fee(s).

Moreover, Chapter 1 § 9 paragraph 2 should also be read together with Chapter 1 § 8, which is the third situation that Chapter 2 § 4 refers to. Chapter 1 § 8 states that:

"If, at the time of submission of the tender, information relating to the Site or the area affected by the Total Works is lacking, the circumstances shall be assumed to be such as could have expected to prevail after expert assessment."

Chapter 1 § 8, together with Chapter 2 § 4, is a risk allocation provision that governs which party shall be liable for costs or works that occur during the project due to events or circumstances that no party is liable for under either Chapter 1 § 6 or Chapter 1 § 7. If this is the case, Chapter 1 § 8 provides that the contractor is liable if the event or circumstance giving rise to the works:

(i) is relating to the Site or the area affected by the Total Works,
(ii) could be foreseen by an "expert"[63], a professional – "an experienced contractor"[64],
(iii) at the time of submission of the tender.

However, if these conditions are not satisfied, the employer is liable instead and the contractor is entitled to claim additional payment under Chapter 2 § 4 and, if necessary, a time extension under Chapter 4 § 2.

Similar to Chapter 1 § 6 paragraph 3, it should be noted that to assess exactly what is covered by Chapter 1 § 8 could be a complex exercise that must be performed on a case-by-case basis. Additionally, as mentioned above, AB 04 does not provide any details regarding the exact "level of professionalism" covered

[62] A defect according to AB 04 means: non-conformance which implies that a part of the Total Works has not been executed at all or has not been executed in accordance with the contract.

[63] As discussed above, see under heading "5.2.1 (i) "that data according to Chapter 1 § 6, for which the Employer is responsible, are not correct".

[64] This concept is used in both Fidic Red Book 1999 (see, e.g. Sub-Clause 4.7 "Setting Out") and 2017 (see, e.g. Sub-Clause 17.2 "Liability for Care of the Works").

by the assumption in this provision, by the concept of "*fackmässig*". The discussion pursued above regarding the scope of the concept of professionalism (Sw. *fackmässig*) is as relevant here as when assessing Chapter 1 § 6 paragraph 3.[65]

The Supreme Court's judgment in NJA 2015 s. 3, 27 January 2015 is of special importance in this context. In the judgment, which concerned the scope of the contractor's professional assessment under Chapter 1 § 8, the Supreme Court stated, *inter alia*, that if two, or more, circumstances could be assumed after a professional assessment is made, the contractor has a right to assume the one which involves the least expense[66]. Moreover, the Supreme Court stated that the contractor shall, as a part of the professional assessment, conduct an examination of "available records"[67] in order to identify risks that may affect the execution of the Contract Works.[68] If it is "likely" (Sw. "*troligt*") that a circumstance or an event exists or does not exist, the contractor shall take that into account when making the Tender; in other words, when calculating the scope of Contract Works. However, if, in approximate terms, it is just as likely that a circumstance exists as that it does not, then the contractor does not need to take that circumstance into account.[69]

5.2.3 Summary

The aforesaid means the following: when the contractor submits a tender with an offered price for the execution of the Contract Works, the contractor should be aware that the offered price covers all that is needed for the execution of the Contract Works. If the contractor nevertheless has to perform altered/additional works (*incurs costs that are not covered by the contractor's offered price*) and:

– the employer is not liable for the event or circumstance giving rise to the works under Chapter 1 § 6,

and the event or circumstance giving rise to the works:

– could be foreseen by doing a visual inspection, "by visiting the place", according to Chapter 1 § 7,

[65] See above under heading "5.2.1 (i) "that data according to Chapter 1 § 6, for which the Employer is responsible, are not correct".
[66] Para 13 in the judgment.
[67] Sw. tillgängligt underlag.
[68] Para 14 in the judgment.
[69] Para 15 in the judgment.

and/or

– (i) is relating to the Site or the area affected by the Total Works,
  (ii) could be foreseen by an "expert", a professional – "an experienced contractor",
  (iii) at the time of submission of the tender,

then the contractor is liable for the costs incurred and, consequently, Chapter 2 § 4 is not applicable.

However, if the event or circumstance giving rise to the altered/additional works:

– is something that the employer is liable for under Chapter 1 § 6,

and/or if the event or circumstance:

– could not be foreseen by doing a visual inspection, "by visiting the place", according to Chapter 1 § 7,
– could not be foreseen by doing an assessment according to Chapter 1 § 8,

the opposite shall apply instead. In that case the contractor is entitled to claim additional payment for the executed works under Chapter 2 § 4.

Notification of Alterations and Additions under Chapter 2 § 4

Chapter 2 § 6 is not applicable in relation to Alterations and Additions under Chapter 2 § 4. Instead, works equivalent to Alterations and Additions shall be notified in accordance with Chapter 2 § 7. This provision stipulates that the contractor shall, without delay, obtain the employer's views if the contractor considers that circumstances as intended in Chapter 2 § 4 exist (and that the cost of the Alterations and Additions occasioned by the circumstances will exceed the limit amount[70], which is half of the price base amount[71]).

If the contractor carries out works equivalent to Alterations and Additions without complying with Chapter 2 § 7, Chapter 2 § 8 is applicable in precisely the same way as described above.[72]

[70] Chapter 2 § 7 paragraph 2 provides that: "If the Contractor reaches the assessment that the cost of the Alterations and Additions will be less than the limit amount he is entitled to begin the work immediately. However, the Contractor has an obligation to notify the Employer of the work without delay.".

[71] A Price Base Amount according to AB 04 means: Price Base Amount under the National Insurance Act (1962:381). However, the National Insurance Act (1962:381) is no longer in force, hence the price base amount is probably instead defined by the Social Insurance Code (2010:110), 2020 it was SEK 47 300.

[72] Under the heading "Instructed Alterations and Additions (Chapter 2 § 3)".

6. Rectification Works

According to Chapter 5 § 17, paragraph 1, the contractor has a right and a duty to rectify whatever may have been noted as defects[73] in an inspection report or which the employer has reported in writing in accordance with Chapter 5 § 15. Furthermore, Chapter 5 § 17, paragraph 4, provides that "*If the Contractor is not responsible for the defect, he is entitled to payment as provided by Chapter 6 §§ 1–7 and 11*", interpreted *a contrario, "If the Contractor is responsible for the defect, he is not entitled to payment*"[74]. However, if a defect is to be considered as "not substantial"[75] according to Chapter 5 § 18, the defect may instead (of being rectified by the contractor) be handled through a deduction of the Total Works Price.

Consequently, the contractor is obliged to perform works and supply materials/goods, etc. necessary to fulfil the rectification obligation provided by Chapter 5 § 17. How significant is the scope of this obligation to rectify? Is the scope of rectification works limited in some way? AB 04 does not answer these questions, although the Supreme Court has had reason to adjudicate these issues.

In NJA 2018 p. 653, 17 July 2018, the Supreme Court clarified that if a defect cannot be rectified without other works being first uncovered, the contractor is also liable: (i) for uncover-works, prior to the rectification; and (ii) for reinstate-works thereafter. According to the Supreme Court, the contractor's liability for these measures is neither limited by the concept "Total Works" (Sw. *Entreprenad*) (uncover- and reinstate-works may include measures outside the contractor's Total Works)[76] or the limitations of liability stated in Chapter 5 § 11[77] (the provision is not applicable). However, the contractor shall only be liable for such measures that: (i) could be foreseeable when the agreement

[73] AB 04's "definitions and notes" section provides that a "Defect" is: "non-conformance which implies that a part of the Total Works has not been executed at all or has not been executed in accordance with the contract.".

[74] As explicit being stated in paragraph 5. It shall, however, be noted that if the contractor is being reimbursed according to the prime cost principle (Chapter 6 §§ 9–10) or other "cost-plus-overheads-and-profit-basis"-model, Chapter 5 § 17 paragraph 5 instead prescribes that "when the defect relates to work which has not been done, however, it shall be rectified at the expense of the Employer, unless the Contractor has previously received payment for the work concerned". It may be noted in this context that in earlier versions of AB (e.g. AB 72), the concept of "Brist", which is closer to the term, "deficiency" was used instead of "Defect", in case a part of the Total Works had not been executed.

[75] Formulation borrowed from the Supreme Court's judgment in NJA 2014 p. 960, 23 December 2014, para 16 (ABT 94 Chapter 7 § 26 is equivalent to AB 04/ABT 06 Chapter 5 § 18).

[76] Para 41 in the judgment.

[77] Para 49 (ABT 94 Chapter 5 § 14 is equivalent to AB 04/ABT 06 Chapter 5 § 11) in the judgment.

was entered into and (ii) must be performed as a direct necessary result in order to successfully rectify the relevant defect.[78]

It may further be noted that the Supreme Court in NJA 2014 p. 960, 23 December 2014, held that an employer may claim compensation regarding rectification works (since NJA 2018 p. 653, potential uncover- and reinstate-works are included here) before the defects have actually been rectified. In other words, the employer is entitled to pursue a claim based on estimated costs for the measures covered by the rectification.

7. Summary and Final Conclusion

Common disputes under commercial construction agreements are often more or less derived from issues concerning the scope of Contract Works, or practically, the design provided in the Basis for Tenders and the Contract Documents (when a design-bid-build contract). Issues include, *inter alia*, whether:

(i) *a work, temporary work included, shall be covered by the Contract Price,*
This is due to the fact that the contractor, as a main rule, is not entitled to claim further compensation subsequently for costs regarding Contract Works that the contractor has failed to calculate remuneration for within the offered Contract Price; or if the contractor is instead getting compensated according to the prime cost principle, is not entitled to claim further (higher) fees for (if the fee is set higher for Alterations and Additions than for Contract Works).

(ii) *the object, the Total Works, has been completed within agreed Contract Period,*
This is due to the fact that the contractor, other than pursuant to the provisions regarding hindrances, is only entitled to a time extension to the extent that Alterations or Additions, not Contract Works, affect the possibility of meeting the Contract Period.

(iii) *a work/cost, temporary work included, shall be considered equivalent to Alterations and Additions prescribed by the employer,*
This is due to the fact that, *inter alia*, the Contract Documents will determine which data the employer is liable for under chapter 1 § 6 and the Basis for Tenders will determine which (events/circumstances) works the contractor is liable for under chapter 1 § 8 (and *vice versa*).

[78] Paras 44 and 45 in the judgment.

(iv) *the contractor is required to execute a "ÄTA-work" ordered by the employer,*
This is due to the fact that the employer's power to vary is limited by the nature and scope of the Contract Works. The contractor is only required to execute the ordered work if the work is: (i) directly connected with; and (ii) not essentially different in nature from the Contract Works. Thus, the scope of the Contract Works defines the scope of possible Alterations and Additions.

(v) *a work is defective,*
This is due to the fact that a defect according to AB 04 means that a part has either not been executed at all or not in accordance with the Contract (Documents).

(vi) *the contractor shall be liable for certain rectification measures (uncover-works and reinstate-works included),*
This is due to the fact that the contractor according to NJA 2018 p. 653 is only liable for such rectification measures that: (i) could be foreseeable when the agreement was entered into and (ii) must be performed, as a direct necessary result, in order to successfully rectify the relevant defect. Thus, "what could be foreseeable" will be affected by, *inter alia*, the Contract Documents and the scope of the Contract Works.

Since the foundation of any construction project is the work that shall be executed, a profound and thorough description of the object to be performed is absolutely critical in this context. Thus, a solid and well-prepared Basis for Tender, design package etc., is one of the best "insurances" against construction disputes. Well drafted provisions are of course important as well, however, a "legally" well-written construction agreement can never fully counterbalance ambiguous design descriptions and vague requirements. Likewise, thorough calculations and well-prepared Tenders are vital as well.

The aforementioned issues are fundamentally the same regardless of whether the construction agreement incorporates AB 04 (performance contracts, design-bid-build) or ABT 06 (turnkey projects, design-build); the only consequence is that essentially the liability shifts depending on which party has provided the applicable data, information, technical solution, etc. (as provided in Chapter 1 § 6).

Therefore, in order to reduce the risk for disputes and cost overruns, both the employer and the contractor have to more or less jointly work with the scope of work before signing the agreement. The participation of counsel at this juncture is advisable to the extent that the construction agreement may include, *inter alia*, duly references to the project's design documents and specifications, as well as unambiguous reimbursement provisions (which clearly provide which

compensation the contractor is entitled to receive for executed Contract Works and for performed Alterations and Additions).

There is a major difference (as regards economic loss) between finding incomplete descriptions during the tender stage of a project, or earlier, instead of later, during the execution phase. Some of the advantages with identifying scope of work issues early include: avoiding on site co-ordination problems, time losses, sensitive discussions regarding additional payment and deductions.

Consequently, cutting corners during a construction project's tender stage is almost always to be avoided.