**HIERARCHY OF CONTRACT DOCUMENTS**

The issue of hierarchy of documents within a building contract is a perennial problem - the sheer volume of documents to be included in a building contract means there is a high risk of discrepancies between them and the question of which, if any, document should take priority will need to be resolved to decide which provision prevails.

A recent UK case, *Fenice Investments Inc v Jerram Falkus Construction Ltd* [2009] EWHC 3272 (TCC) considered this issue in relation to a dispute over the applicability of two conflicting interim payment provisions.

The contract in question incorporated the JCT Design & Build Contract (Revision 1) 2007, as amended by specific amendments agreed between the parties. In line with the JCT payment mechanisms, alternative B had been selected. The Employer’s Requirements (also part of the contract documentation) also contained provisions dealing with payment.

As the two differing sets of payment provisions could not be made to work together, not least because the conflicting provisions produced different starting points (and therefore end points) of the payment mechanism, the Court was required to choose between the two payment mechanisms and apply one over the other.

In considering this issue, the Court held that one of the general rules of the interpretation of contracts is that where a term has been specifically drafted for a contract, then that term will take precedence over a standard term.

However, this rule is rebuttable and does not apply to all contracts. It can be overridden by an express term of the contract. Clause 1.3 of the standard JCT conditions states that “The Agreement and these Conditions are to be read as a whole but nothing contained in the Employer’s Requirements, the Contractor’s Proposals or the Contract Sum Analysis shall override or modify the Agreement or these Conditions.” The Court found that this displaced the general rule referred to above such that the (amended) JCT provisions prevailed.

**A Useful Reminder**

This UK case provides a useful reminder that if you are going to amend contracts you must do so by amending all of the related provisions.
If you are the person putting the contracts together it is not helpful to simply include correspondence, minutes of meetings etc. within contract documents ("every piece of paper that related, no matter how tangentially, to the project in question") without fully considering what they are intended to achieve and whether there is a better way of going about it.

It is vital that the hierarchy or precedence of contract documents is defined otherwise the general rule that negotiated clauses take precedence over standard terms may result in a significantly different outcome.
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