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Construction Contract Documents - mutually explanatory of one another or complimentary

In contracts that have both specifications and drawings included as part of the contract documents you will frequently find a statement that documents are to be taken as “mutually explanatory” or “complimentary.” For example, in construction if a document such as a bill of quantities stated the specific amount of soil for excavation and a specification stated the specific size of excavation footings and foundations, what would happen if the amount specified had been consumed, but there was still more excavation required to comply with the specification? Using “mutually explanatory” or “complimentary” is an attempt to have the multiple documents read together to determine the full requirements so not only did the contractor have to excavate the specified quantity, they also had to meet the specification even if that required additional excavation.

In most of those contracts that use “mutually explanatory” or “complimentary” there may be no order of precedence established between the drawings and specification. If there is an Architect or Engineer involved in the design, most of the time they would prefer not to have an order of precedence and have themselves be the decider of the conflict. If they do include an order of precedence it may give precedence to the most costly of the two items in conflict. As a representative of an owner I always preferred to include an order of precedence to deal with these types of potential conflicts. I didn’t want the architect or engineer to be free to spend my company’s money, and that could occur if you gave them full authority to make these decisions. Construction is local, so an Architect or Engineer and a contractor may have had significant prior dealings and relationships so while ethically they should be neutral, they may not always be neutral.

As between drawings and specifications, which should have precedence? Architects or engineers will say neither, they should be considered complimentary or mutually explanatory. Some groups give precedence to the drawings over the specifications and some give precedence to the specifications over the drawings. The keys in deciding the priority should be 1) what document provides a more detailed description of the requirements and 2) what type of contract are you buying the construction under.

For example, using the soil excavation issue if the contract was based upon measured quantities under a bill of materials system, you have two things in conflict. The quantities listed in the Bill of Materials, and the quantities required by the specification. If the quantity in the bill of materials didn’t take into account the amount of total excavation required to comply with the specification, the contractor would perform the work to meet specification and bill and be paid for the additional quantities measured. If the soil issue arose under a lump sum contract, there would be no estimated quantities provided, and the contractor should have determined the total amount of excavation required to meet the specifications.

I’ve always recommended against providing quantities in a lump sum contract because of the potential for conflict and claims that can arise if there is a difference between the stated quantity and the actual quantity required. If there is something where the volume could not be reasonably determined, there are other options than providing a specific quantity. For example the amount of soil that would need to be removed and replaced on a specific site because of concerns about the soil quality. In that case the owner would be concerned that the Contractor would include too high of a contingency because of the uncertainty. You can always exclude portions of the work from the lump sum and have that work be done on a unit rate basis that gets measured.

In doing a lump sum contract I would never provide Bills of Quantities. If you do, and your quantities are wrong or inadequate to complete the work, there will be a claim. If you don’t provide quantities, it is up to the contractor to determine what quantities are required to meet the design. If you must include quantities, I would always make the document that lists those quantities the lowest priority. Using the excavation example, I would have the specification that required specific depths for the footings and foundations have priority over the bill of quantities so when the two are in conflict, the specification requirements would have priority in the conflict between the two documents. A second reason to not provide quantities under a lump sum agreement is under lump sum agreements you don’t staff the site to measure quantities. So you wouldn’t know if the quantities were or if there were exceeded.

If an order of precedence does not exist, all terms of the contract documents have equal standing. When you include an order of precedence provision all that does is say that in the event there is a conflict between a higher precedence document and a lower precedence document, the term or requirement of the higher precedence document shall prevail.

Each time you have multiple documents that make up a contract, always consider and establish the precedence you want between all of the documents that are incorporated. This is especially important if you will be incorporating any of the supplier or contractor’s documents as part of the agreement.