

BEST PRACTICE BULLETIN #6

Approved August 30, 2024

SUBJECT: LETTERS OF INTENT

In certain circumstances, rather than being provided with a formal building for a contract, a party may be issued a “letter of intent” (“LOI”). A LOI is a document which expresses an intention to enter a formal building contract and will generally outline a number of the terms of said contract. LOI’s are often used to allow for certain procurement or early construction to occur while the larger details of the building contract are negotiated between the parties.

A common question that arises in these instances is whether the LOI is a binding contract between the parties with respect to the project.

CCDC 23 – 2018 A Guide to Calling Bids and Awarding Contracts states the following with respect to the issuing of LOI’s:

Alternatively, where the Owner wishes to award the construction contract subject to conditions, or the signing of the contract must be delayed for some reason, the Owner may issue a letter of intent, which implies only an “intent” to enter into a contract at some future time. Depending on the wording of the letter of intent, and on the nature of the outstanding issues preventing unconditional acceptance of the Bid or prompt signing of the contract, a legally binding construction contract (Contract B) may or may not be created by the letter of intent. The contract may not actually be created until both parties have signed the Agreement. A Bidder is not obligated to commence the Work before being satisfied that a legally binding contract actually exists, and does so at its own risk. The Owner may also be at risk in this situation should a dispute arise. Consequently, the Owner should obtain legal advice when issuing a letter of intent.

While LOIs are typically viewed as a precursor to a binding contract, there are certain instances where, by either the words used in the LOI, and/or the conduct of the parties, courts have found an LOI to be enforceable agreement. This becomes important when one party is looking to force the other to uphold their obligations under that agreement. If a binding agreement is reached between the parties, non-performance by either party with respect to any aspect of the agreement may then amount of a breach of contract, which may entitle the other party to damages or other legal remedies.

In determining whether an LOI is an enforceable agreement, the key consideration is whether there is evidence the parties

have intended to be bound to the terms of the LOI. The intention of the parties will be assessed from both the words used in the LOI, and, in certain circumstances, the behaviour of the parties.

Courts have looked at the following factors in determining whether a binding agreement has been reached through an LOI:

1. If the LOI clearly sets out the material terms of the building contract (e.g., the parties, price, the work, timing/schedule of the work) this may point towards a finding that an agreement has been reached. If these materials terms remain subject to further agreement, it is less likely the LOI will be found to be a binding agreement.
2. If the LOI appends or makes reference to a specific standard form agreement (e.g., CCDC 2) to be entered into, this may lead to a finding the parties have an agreement on the material terms of the contract.
3. The use of such terms in the LOI such as “it is agreed” or “the parties shall” with respect to essential terms of the building contract may suggest an intention that the parties have in fact reached an enforceable agreement.
4. The use of express language indicating that the LOI is “subject to” the execution of a further contract may point towards a finding that the LOI is not a binding agreement for the project.
5. In addition to the words used in the LOI, courts have looked to the conduct of the parties following the signing of a LOI to assess whether the party was acting in a manner which demonstrated they considered themselves to be bound to its terms. Behaviour implying an agreement has been reached may point to a court finding it has.

The determination of whether the LOI amounts to a binding agreement with respect to the project will always be a determination made in relation to the specific facts of the LOI and project in question.

Further, even if the LOI is not a binding agreement with respect to the entire project, it can create certain binding obligations on the parties. For example, an LOI may direct the contractor to begin certain early works or procurement. In these instances, it will be important for the contractor to carefully the rights and obligations imposed by the LOI before signing the LOI or commencing these early works and procurement.

Legal advice should be sought by any party seeking clarity as to the respective rights and obligations imposed by an LOI they are considering issuing or have been issued.