

## The Letter of Intent

Today we live in the world of the instant. There is no time to wait or lose and projects must start immediately, or so it sometimes seems.

For good reason and over a very long period of time, the industry developed numerous standard forms of contract that set out the essentials of a contract. By essentials I do mean that a lot of time and effort went into the drafting of such contracts and many have been challenged and reviewed by the Courts such that their meanings can be fully understood. Of course, thereafter our legal chums set about undoing all the good work, sometimes for very good reasons but often just to unbalance the risk in the contract, allegedly in response to the perceived needs of their clients.

A true letter of intent is nothing more than an expression of intent and an expression of intent is not a basis upon which any rights can be exerted. A more ingenious form of such a letter comes when the parties carefully set out a series of rights, obligations and limitations upon their agreement.

Such an arrangement could be classified as 'a contract' because indeed, that is what it is. Oddly the parties have gone to the trouble of drafting and entering into a contract because they do not have time to conclude a contract?

In support of the Employers, let's consider the **Mowlem<sup>1</sup>** case. This is a prime example of a project that could not possibly have been conceived and commenced the same day as it involved marine operations. The parties did not conclude a contract for the works but proceeded on the basis of series of letters of intent. In the end the LOI capped the available payment to Mowlem at £10M, a not unsubstantial sum. In short, Mowlem blundered on with the works and incurred costs in excess of the cap in completing the works. Mowlem were unsuccessful in recovering their excess expenditure, hence the term *blundered*.

On the Contractor's side consider the **Royal High<sup>2</sup>** case. This involved a PFI schools project in Edinburgh and was between the contractor engaged to build one school and the JV engaged for a package of schools.

As ever with PFI, there was apparently a desperate need to start on site, so the particular venture commenced on the basis of an LOI which was updated several times. The wording provided that in the event a contract could not be concluded then all costs and losses incurred would be met. The Claimant was able to recover all cost and losses including loss of profit.

The problem with LOI's as ever, arises when the parties fall out, for whatever reason. This is illustrated in the **Diamond Build<sup>3</sup>** case. The introduction to this case summarises the matter of LOI's succinctly "*This case illustrates the dangers posed by letters of intent which are not followed up promptly by the parties' processing of the formal contract anticipated by them at the letter of intent stage.*"

Before a formal contract was concluded, the parties fell out and their relationship was terminated. The LOI contained terms that limited the contractor's ability to recover costs. The contractor had exceeded the authority of the LOI by the time the parties ceased working together. No other contract had come into being or been agreed by that time.

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<sup>1</sup> Mowlem PLC (Trading as Mowlem Marine v Stena Line Ports Limited [2004] EHC

<sup>2</sup> Robertson Group (Construction) Limited v (First) Amey-Miller (Edinburgh) Joint Venture; (Second) Amey Programme Management Limited and (Third) Miller Construction (UK) Limited [2005] CSOH 60

<sup>3</sup> Diamond Build Limited v Clapham Park Homes Limited [2008] EWHC 1439 (TCC)

In every case, where an LOI comes into being, the parties have already gone through the process of preparing and issuing tender documents (they would never have been dealing with one another had this not been the case).

So it comes as a bit of a surprise that there is ever any need to use an LOI at any point. The certainties in life may well be death and taxes and it is the case individuals have little or no control over either of these matters. Construction projects are entirely different, they are generated by individuals and/or businesses but are entirely within the control of the parties.

So, take your time and prepare properly, if the project needs to be delayed a day, a week, a month or a year, then so be it. All the more reasons for having every "t" crossed and "i" dotted, when it is ready to go. If you cannot get the contract finalised in time what is the chance of the design being timeous?

Letters of intent, you know they are not clever, so do not do it but, if you must, here are the 'rules':

1. Set out the scope of the letter clearly
2. Set out the limit of authority both in monetary terms and time limits
3. Set out how the executed work will be incorporated into formally executed contract
4. Set out exactly what will be paid for and what will not be paid for as part of the monetary authority, should no contract be executed
5. Set out how matters will be ended between the parties, should no formal contract be executed
6. Set out work executed will be valued in the interim up to the point of execution – by reference to what? (actual cost incurred or the priced document)
7. Do not continuously extend the LOI – finalise the contract or brings work to an end
8. When the limit of authority is reached, the works must stop – unless the LOI is extended
9. Alternatively and to be preferred – execute the formal agreement timeously

Both parties should remember, you can always walk away from a contract rather than agree a muddle. In my line of work I see the results of the failure to make the decision to simply walk away. The success of any business is measured by profit not by turnover.