

SCRIBBLES SQUIBS¹ #82 (June 5, 2024)

WHEN DOES A MASSACHUSETTS CONSTRUCTION LETTER OF INTENT BECOME ENFORCEABLE AS A CONTRACT?

By Attorney Jonathan Sauer
June 5, 2024

I. INTRODUCTION

Is it a big deal to work off of a letter of intent? Isn't that the same thing as a contract?

The quick answer to the first question is 'yes'. And, the quick answer to the second question is 'no'.

A war story.

For many years, I represented a steel fabricator. It was in the process of negotiating a sizeable subcontract with an erector for a certain project. Only, the longer the parties talked, the more the steel fabricator wanted *not* to contract with this erector.

There was no signed subcontract between the parties. The parties were working off of something that looked like a letter of intent.

But, here is where this situation became dicey. Somebody at the steel fabricator's office had sent the erector a change order, which both parties signed. The change order listed all of the numbers that would apply to this contract were there to be a contract. The steel fabricator then backed out of the deal/potential deal.

The erector sued the steel fabricator. In the suit, the erector attempted to get an injunction against the fabricator's receiving a sizeable amount of money from the general contractor, which

¹ A 'squib' is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a 'squib' as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

amount the erector claimed represented the lost profits it would have earned had it been allowed to do this job. In other words, the erector wanted to fund its claim with these monies.

The erector was not successful in obtaining the injunction for various legal reasons.

Some years down the road, the steel fabricator paid the erector twenty-five thousand dollars in exchange for a release. I thought then - and, now - that this was a good deal for the steel fabricator.

After all, how can you have a change order without having an underlying contract?

A letter of intent (LOI), quite simply, is a written document setting forth some agreed-to terms for the performance of a job. Under some circumstances, a court might enforce the LOI as a contract even when no 'contract' had been entered into by the parties. Under other circumstances, the court would not enforce the LOI as a contract but, rather, as a preliminary document prior to entering into a contract. Examples of each follow.

This is a heavily-litigated subject with a great number of Massachusetts' appellate courts considering whether or not certain language constitutes a letter of intent only or as being sufficient to constitute a contract. In fact, an appellate court in a decision actually came up with specific language it considered to be a format for an LOI that would not become a contract. (Courts do things like that very rarely.)

It would be my opinion that even if a letter of intent is not enforceable as a contract and the subcontractor is discharged before a contract is entered into, the LOI would be sufficient to be enforceable as an *implied* contract for whatever work the subcontractor had performed under the letter of intent, entitling the subcontractor to be paid for the fair and reasonable value of that work. These are so-called *quantum meruit* damages.

Also, the more work that is done under an LOI, the more likely a court would construe the LOI as a contract, it appearing that the parties by their conduct had waived their right to having an actual written executed contract before being bound.²

² A contract requires three elements: (1) an offer to enter into a contract, such as a subcontractor's proposal; (2) an acceptance of that offer; (3) consideration. 'Consideration' is what each party is going to get out of the contract. To form a contract, this can be done in as little as two or three sentences. **Offer:** "I will paint your conference room pink using two coats of Benjamin Moore paint for \$1000 applied over one coat of primer, starting next Monday and finishing next Friday." **Acceptance:** an email in response to the offer: "OK". **Consideration:** The 'consideration' for the painter is \$1000. The 'consideration' for the owner is that s/he will have his/her conference room painted next week. All three elements for a contract exist. As one can see, not much is required for there to be a 'contract'. While construction contracts are often quite complex in appearance and content, the *concept* of what constitutes a contract is really quite simple.

II. THE THREE FACTORS WHICH WOULD KEEP A LETTER OF INTENT FROM BEING CONSIDERED TO BE A CONTRACT

The three factors which will keep a letter of intent from being enforced as a contract are:

1. It is clear in the LOI that not all of the business parts of the future contract involving **scope and/or price** have been fully negotiated yet. So, there are still remaining issues of scope and/or price to negotiate.
2. The **form of contract** has not been agreed to yet.
3. **The parties state that they don't intend on being bound by the letter of intent but only by the execution of a future contract.**

The Massachusetts Appeals Court has prepared sample language which will keep an LOI from being enforced as a contract, which language is as follows:

"The purpose of this document is to memorialize certain business points. The parties mutually acknowledge that their agreement is qualified and that they, therefore, contemplate the drafting and execution of a more detailed agreement. They intend to be bound only by the execution of such an agreement and not by this preliminary document."

III. AN EXAMPLE OF AN LOI THAT COULD BE ENFORCED AS A CONTRACT:

June 5, 2024

Mr. Joe Blow
Up and Down Elevator Company
11 Lift St.
Anytown, MA 22222

RE: Owner: City of Boston (Boston)
Project: Install Elevator in One Floor School House, Project No: 123456 (Project)
General Contractor: Last Chance General Contractor (Last)
Subcontractor: Up and Down Elevator Company (Up and Down)

LETTER OF INTENT

Dear Mr. Blow:

As you know, Last was the lowest general bidder for this Project and it has been verbally awarded this Project by Boston. And, as you also know, Last carried Up and Down as the elevator subcontractor based on its filed sub-bid.³

This will advise that it is Last's intention of entering into a contract for Project with Up and Down, using the 'statutory subcontract' form contained within the Massachusetts bid laws in the amount of Up and Down's filed sub-bid of \$3,400,000 and in accordance with all of the bid document/contract document requirements for Project, all of which are incorporated herein by reference.

This subcontract form will be tendered to you shortly. It takes a while to get the subcontracts prepared for the various filed sub-bidders. In our office, they are usually prepared as a group for all of the filed sub-bidders at one time, and not individually.

By your signature below, this acknowledges that this manner of proceeding is acceptable to Up and Down and it is Up and Down's intention of entering into a subcontract with Last on the same basis. Please have this letter signed by an authorized person at Up and Down, sending Last the original, signed letter.

As this greatly benefits the Project, Last and Up and Down, please start with the preparation of the usual preliminary documents for this Project, such as the preparation of a schedule of values and, especially, the preparation of shop drawings and submittals.

Please contact the undersigned with any questions or concerns.

Very truly yours,

William J. Clinton, Project Manager

ACKNOWLEDGED AND AGREED-TO BY UP AND DOWN ELEVATOR COMPANY:

By: _____ Date: _____
Authorized Signatory for Up and Down Elevator Company

³Under the Massachusetts statutory scheme for the award of contracts on public building projects, a public owner receives bids on eighteen enumerated sub-trades directly - elevators being one of them. In other words, bids are not submitted to general bidders. They are submitted to the public owner. These trades are referenced as 'filed sub-bids'. A general contractor bidder has to 'carry' a filed sub-bidder for each trade required for the project from a tabulation of the filed sub-bids that have been received by the public owner. The low filed sub-bidder is not legally entitled to the award of a contract. But, general contractor bidders generally carry the lowest filed sub-bidder for each trade in their attempt to be awarded the general contract, which generally goes to the general contractor which has submitted the lowest responsive and eligible general bid. The form of the subcontract between the general contractor and the filed sub-bidder is specifically contained within Massachusetts General Laws (MGL) C. 149, s. 44F. This is often referenced as the 'statutory subcontract'.

Note that all three factors that would keep this LOI from being enforceable as a contract have been addressed in the above letter of intent:

1. It is clear that the business parts of the future contract involving both scope and price have been established, as Up and Down has submitted a detailed filed sub-bid to Boston for the Project. The exact 'scope' is established by the plans and specifications. There are no price issues to negotiate because, as a matter of law, the price is set as the exact amount of the filed sub-bid and cannot be changed by the general contractor (or by the owner).

2. The form of contract, called in Massachusetts-speak, the 'statutory subcontract', has been established, as it is specifically set forth in MGL C. 149, s. 44F. So, there is no form of subcontract for the parties to choose, as it has already been chosen by and through the bid process.

3. The parties don't state that they only intend on being bound by the execution of a future contract. The form and content of the subcontract are set forth by statute, as stated above. Both Last and Up and Down are bound by their bids, each bid supported by a bid bond, the condition of which is that that party will enter into a contract with their upstream party. Since the parties, in this case, will have to enter into a 'statutory subcontract', there is nothing left to negotiate as to that issue.

It should be noted, however, that if this LOI were to be given to a **non**-filed sub-bidder on a public job - as an example, the landscaper - if there was language in the LOI to the effect that the parties intend on being bound when they execute an AIA A401 subcontract, because this is a form that is well-understood and widely used and accepted, this will, most likely, not keep the letter of intent from being enforceable as a contract if based on this ground alone.

IV. AN EXAMPLE OF AN LOI THAT PROBABLY WOULDN' T BE ENFORCED AS A CONTRACT:

March 24, 2024

Ms. Jane Doe
Dirt Cheap Landscaping Company
14 Oak St.
Notown, MA 33333

RE: Owner: Dunkin' Donuts Corporation (Owner)
Project: Install Elevator in the New One Story Canton, MA Dunkin' Donuts (Project)
Store No: 123456
General Contractor: Last Chance General Contractor (Last)
Trade: Landscaping
Subcontractor: Dirt Cheap Landscaping Company (DCL)

DCL's Proposal dated February 21, 2024 (Proposal)
LETTER OF INTENT

Dear Ms. Doe:

As you know, Last is the general contractor for Project. DCL has submitted a Proposal to Last to perform the landscaping work at Project.

Please accept this letter as Last's letter of intent to enter into a subcontract with DCL for the landscaping for Project per the terms set forth in your Proposal subject to the following two sentences. Both Last and DCL agree that they have not yet reached agreement on all key parts of their business deal with remaining essential scope and price issues to be further negotiated and resolved. Further, both Last and DCL agree that neither party is to be bound by signing this document and that neither party will be bound until they both sign a contract, which they contemplate as the document containing their complete agreement, the terms and form of which contract have yet to be agreed-upon.

Please have this letter signed by an authorized person at DCL, sending Last the original, signed letter.

As this greatly benefits the Project, Last and DCL, please start with the preparation of the usual preliminary documents for this Project, such as the preparation of a schedule of values, the preparation of shop drawings and submittals and that DCL presently order any long-lead time items. Please contact the undersigned with any questions and concerns.

Very truly yours,

William J. Clinton
Project Manager

ACKNOWLEDGED AND AGREED-TO BY DIRT CHEAP LANDSCAPING
COMPANY:

By: _____ Date: _____
Authorized Signatory for Dirt Cheap Landscaping Company

Let's compare the above LOI with the three factors as described above:

1. It is clear that not all of the business parts of the future contract involving scope and/or price have been fully negotiated. So, there are still remaining issues of scope and price to negotiate.

2. The form of the contract has not been agreed to yet.

3. The parties state that they don't intend on being bound by the letter of intent but only by the execution of a future contract.

What kind of language would Last use in an LOI if it wanted to be sure that the LOI would not be enforceable as a contract?

Here's some language:

"Last and DCL both state that they have not yet reached agreement on all key parts of their business deal as to scope and price and that neither is to be bound by signing this document and won't be bound until they both sign a contract, which they both contemplate, the terms and form of which contract have yet to be agreed-upon."

All three key items above which would prevent an LOI from being considered a contract have been incorporated into just this one sentence.

This article is not intended to be specific legal advice and should not be taken as such. Rather, it is intended for general educational purposes only. Questions of your rights and obligations when dealing with letters of intent are best addressed to legal professionals of your own choosing.

Jonathan P. Sauer

Sauer & Sauer
15 Adrienne Rd.
E. Walpole, MA 02032

Phone: 508-668-6020,6021

jonsauer@verizon.net jonsauer@sauerconstructionlaw.com

www.sauerconstructionlaw.com

This article is not intended to be specific legal advice and should not be taken as such. Rather, it is intended for general educational and discussion purposes only. Questions of your legal rights and obligations under your contracts and under the law are best addressed to legal professionals examining your specific written documents and factual and legal situations. Sauer & Sauer, concentrating its legal practice on construction and surety law issues only, sees as part of its mission the provision of information and education (both free) to the material suppliers, subcontractors, general contractors, owners and sureties it daily serves, which will hopefully

assist them in the more successful conduct of their business. Articles and forms are available on a wide variety of construction and surety subjects at www.sauerconstructionlaw.com. We periodically send out 'Squibs' - short articles, such as this one – commenting on various construction and surety law subjects. If you are not currently on the emailing list, please contact us and we'll put you on it.

“Knowledge is Money in Your Pocket!” (It really is!)

(ADVERTISEMENT)