**Do We Have a Contract?**

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Today's commercial construction market remains very competitive as we slowly exit the downturn. The focus of parties is getting the project rolling. Oftentimes, work is started without a contract. In this circumstance, it is important to understand how the terms of the deal are defined if there is a falling out.

Parties often try to bridge the gap between the award of a project and contract execution via a letter of intent. Generally, letters of intent purport to express the general commercial terms of the deal, but are they enforceable? Historically, letters of intent have been interpreted as "agreements to agree." Thus, partial performance of a contractor under such terms may not create an enforceable obligation against the owner for any early benefit provided.

The recent trend in court decisions is to look closely at the terms of these preliminary agreements. If the terms of the deal are sufficiently clear, contract terms are fully enforceable. The alternative is when the parties commit to negotiate the terms of the deal, but those expressed are not binding. This is particularly true where the letter of intent contains express language that it is not binding. In this case, a party can recover for expenditures made based on reliance on the other's promises. However, damages based on an expectation of a deal -- lost profits, for example -- are not recoverable. To be considered binding, a letter of intent should address all important contract terms and clearly state that it is binding.

Another common issue occurs when one party, but not both, may have signed the contract. In this case, what terms are enforceable? The party who signed a written contract and submitted it to the other party may not assume that all of its terms apply. A court may hold that there was no formal "meeting of the minds" absent execution by both parties. In other words, the second party's performance does not necessarily equate to acceptance of contract terms it did not sign.

However, ignoring a written contract signed by the other party is not risk-free. A contractor may begin performance even though it disagrees with a proposed written contract. Based on the specific facts, some courts may find that the contractor has accepted the terms of an unfavorable contract proposed by an owner.

Perhaps an even more confusing situation occurs where the parties' agreement is documented in multiple writings. In this circumstance, a court is not likely to attempt to parse subtle differences in the "offer" and "acceptance." It will likely try to give each party a reasonable interpretation based on presumed intent. Yet this third party interpretation could easily confirm contract terms at odds with the real intent of either or both parties.

The safest approach goes back to the oldest rule in the playbooks. Both owner and contractor are best served when their agreement is recorded in a formal contract. Ideally, such execution should occur prior to a material commencement of performance by either.