

**CITY OF LONDON LAW SOCIETY
STANDARD FORM LETTER OF INTENT
GUIDANCE NOTE**

Whilst the use of a letter of intent is to be avoided where possible, in certain circumstances the provision of such a letter may be necessary or desirable to allow design, procurement and possibly even construction to be commenced prior to finalisation and resolution of all contractual matters between parties.

The City of London Law Society suggested draft seeks to provide a standard form document that covers typical issues arising in the scenario of a letter of intent being required.

This letter is drafted for use by an Employer appointing a main contractor. However, it is also suitable (with modifications) for use by a main contractor appointing a sub-contractor.

The following notes provide guidance on the completion of the standard form on a project by project basis. References in these guidance notes correspond to the paragraph numbering in the draft letter.

1. The tender date is left to be inserted. If significant minutes of meetings exist then reference could also be included in this paragraph.
2. Operative paragraph confirming an intention to enter into contract upon agreement of terms.
3. Details of the contract and any schedule of amendments need to be inserted into this paragraph, along with all other proposed contract documents. The intended start on site and completion dates should also be inserted, if known. It is vital that all information in relation to the contract documents is clear and correct.

One of the most significant risks in the use of letters of intent is ambiguity as to agreed contractual terms. For instance, if no formal contract is entered into and if the details of the contract documents in any letter of intent are ambiguous, this may lead to uncertainty and dispute as to what was agreed and/or not agreed. Note the comments under paragraph 4 below.

4. This paragraph allows details of any outstanding contractual issues to be inserted. The intention is to record any particular items that are yet to be finally agreed. By doing so, this should focus attention on the need to resolve the listed items. It will also provide evidence that any items not listed are agreed. It is recommended that as much detail as possible be provided.

If there are no items to be agreed, the parties should consider whether or not the letter of intent is appropriate or necessary, other than for a very limited period while formal contract documents are prepared.

5. Details of the authorised activities to be carried out pursuant to this letter need to be inserted in the square brackets. Particular care should be taken before using the letter to authorise a start on site. The parties should be urged to make every effort to enter into a formal contract before work commences, if at all possible. As a general rule, commencement of works on site under a letter of instruction is not recommended and should be discouraged wherever reasonably possible.
6. This paragraph provides that the contract conditions referred to in paragraph 3 will apply to works instructed under this letter, save where inconsistent with the terms of the letter in which case the letter will take precedence.
7. This paragraph should only be included where a contract administrator/employer's agent has been appointed. If not, it will need to be amended. It is strongly recommended that an entity is identified with responsibility for administering and overseeing compliance with the letter.
8. This paragraph requires any contractor to obtain the written consent to any sub-contracting and ensures that in the event that a contract is not entered into, the benefit of such sub-contracts can be assigned to the employer.
9. This requires the contractor to keep the employer fully informed of the progress of works carried out pursuant to the letter.
10. This paragraph deals with payment mechanisms under the letter and contains various options. The main alternatives are for payments to be calculated either by reference to an agreed schedule or on the basis of reasonable costs incurred. Clearly there is greater room for dispute if the latter test is used and users are recommended to avoid it if possible.

In all cases the letter imposes a cap on liability and requires a figure to be inserted. This is essential in order to avoid open-ended liability and to provide an incentive for the parties to put a formal contract in place. The paragraph further provides that the Employer's commitment at the time of the letter is limited to the figure stated.

The letter does not include any express provisions with regards to the mechanics of payment. Where the Housing Grants, Construction and Regeneration Act 1996 ("the Construction Act") applies and the contract conditions referred to in paragraph 3 include provisions which comply with the Construction Act, those provisions will apply. Where the Construction Act applies and the contract conditions do not contain compliant provisions, the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme") will apply.

11. This paragraph deals with the obligation to provide evidence of insurance. The requirements will clearly differ depending on whether or not works on site are to occur under the letter and various options are set out for consideration.

The contractor may not be required to maintain certain insurances, for example all risks insurance (this may be an Employer obligation, particularly where work is to take place

in an existing structure) or professional indemnity insurance (where the contractor does not have any design liability). It is vital that all insurance policies that are required to be taken out and maintained are in place before the issue of any letter of intent.

12. This optional paragraph should specify whether the contractor is to act as the planning supervisor and/or principal contractor for the purposes of the Construction (Design and Management) Regulations 1994 (as amended) ("the CDM Regulations"). It includes a warranty of competence with regards to the provision of either or both of those services.

Employers and contractors should be aware of, or seek advice as to, the respective obligations of clients, agents, planning supervisors, principal contractors and designers as defined in the CDM Regulations.

13. This paragraph sets in place a typical copyright licence with a right to grant sub-licences, such licence to survive the termination of any instruction in the letter. The wording of this paragraph should be reviewed for consistency with any licence provision contained in the proposed contract.
14. This paragraph provides for the right to call for any "proprietary material" as defined and ensures that the copyright licence (see paragraph 13) is capable of being granted.
15. This paragraph puts in place an indemnity with regard to death or personal injury which mirrors that which would exist had any of the standard JCT contracts been entered into. The indemnity will usually only be relevant where the letter authorises commencement of work on site.
16. This optional paragraph provides for the letter of intent to expire automatically on a specified date. Again this is intended to provide an incentive to put a formal contract in place (see paragraph 10 above).
17. This paragraph provides that, in the event that a formal contract is concluded, any works carried out pursuant to the letter of intent will be subsumed into, and governed by, the terms of the contract.
18. This paragraph entitles the Employer to terminate the instruction contained in the letter on 7 days' notice without default, subject to the payment of all reasonable costs. Again there is a cross-reference to the optional cap on liability in paragraph 10. Care should be taken in considering termination, since this may give rise to disputes as to the respective rights and obligations of the parties.
19. This paragraph provides for delivery of the proprietary material, the site, the benefit of any sub-contracts and the agreement of issues with regard to cancellation of any orders in the event of termination.
20. This paragraph is a typical confidentiality clause.
21. This paragraph provides that the laws of England and Wales will apply and that the English Courts will have jurisdiction. If the contract conditions referred to in paragraph 3

include adjudication provisions which comply with the Construction Act, those provisions will apply. If not and the Construction Act applies, the adjudication provisions set out in the Scheme will apply to any dispute in connection with the letter.

22. This expressly excludes the provisions of the Contracts (Rights of Third Parties) Act 1999.
23. This paragraph provides that the letter supersedes any previous instructions or other discussions. It may be deleted if not required.

The letter is to be executed under hand rather than as a deed.

Care and consideration should be given to all project specific issues which will impact on the letter and the completion of it.

Disclaimer and Interpretation

Parties must rely on their own skill and judgment and/or take specialist advice when using the standard form and/or this Guidance Note. Neither the City of London Law Society Construction Committee nor any member thereof nor contributors to the standard form and/or this Guidance Note shall accept any liability to anyone for any loss or damage caused by any use of the standard form and/or this Guidance Note or for any error or omission contained in the standard form and/or this Guidance Note.

This Guidance Note does not form part of the standard form of letter of intent and shall not affect the interpretation thereof.

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