



When Is a Deal A Deal?

by Mimi M. Lines

Ollie Owner and Charlie Contractor, longtime friends, are having a drink at Bert's Place to celebrate Ollie's new fortune—he recently won the state's largest lottery jackpot, more than ten million dollars. Ollie wants to use some of it to build a new house. He has already purchased the land, and the final plans and specifications for the house have been completed. Ollie and Charlie are talking about the cost of building the house, and Charlie is making some notes on a pad and reviewing the plans and specs. Finally Charlie says, "Ollie, I can build this house for you for a million bucks—fixed price. My crew is not busy right now, so we can start next week, and we should finish in seven months."

Ollie looks up from his drink and says, "I accept," since Charlie's number is much lower than the quotes he received from other builders in town.

Have Ollie and Charlie entered into a binding contract? To answer this question, we must look at some basic elements of contract law.

Bid and Acceptance Basics

Construction jobs are generally obtained through a bid-and-acceptance process. Sometimes, as in federal contracts, this process is very complex. When bidding is private, however, the process is somewhat less formal, even though bids may still be in writing on prescribed AIA (American Institute of Architects) forms. In some other cases, a bid may be oral.

Whichever method is used, both owner and contractor have an interest in seeing that the bid and acceptance process is handled properly. Among other things, each party wants a contract that will be enforceable in court.

A bid is a binding offer. In the bid-and-acceptance process, each bid is considered an "offer," which, if accepted, will legally bind both parties. In other words, every bid prepared by a contractor constitutes an offer, which, if accepted, becomes a contract, unless it's specifically stated that the bid is an estimate and is not intended to be binding on the contractor. Contractors must therefore be extremely careful in preparing bids, as they will be bound to any promises those documents contain.

Because Ollie and Charlie are friends, they are going about the bidding process very informally. This oral process creates a much greater chance of misunderstanding than a more formal, written process would, particularly regarding whether Charlie's statements are an offer or an estimate.

When is a quoted price an estimate,

and when is it a bid? A contractor involved in preliminary negotiations with an owner may quote figures before he has a chance to figure a final number. A contractor must take care when doing this to make sure the owner understands that the figure is an estimate which is subject to change rather than a final figure, and that he does not intend to be bound by the estimate. Otherwise, the other party—or a judge in the case of a dispute—may consider it to be an offer which may be accepted by the owner.

Contract Requirements

In addition to offer and acceptance, several other conditions must be present for a contract to exist:

- Both parties must have the legal capacity to enter into a contract.
 - There must be "consideration" for the acts to be performed by the parties.
 - The parties must intend to be bound by a contract and agree on its terms.
- If all these elements are present, a contract can be formed and enforced against both parties. Let's take a look at them, one at a time.

Both parties must have the legal capacity to enter into a contract. That is, the parties must not be minors, and they must not be mentally ill or intoxicated. Since Ollie and Charlie are having a drink, it's safe to assume they are old enough to enter a contract. However, if they've had too much to drink, they may not have the legal capacity to form a binding contract.

There must be "consideration" for the acts to be performed by the parties. A promise made by one party in a contract must be supported by some "consideration" on the part of the other party—in essence, a promise in return. Whatever is promised in return must be something the party is not otherwise legally bound to do. In this case, the consideration given in return for Charlie's offer to build Ollie's house is Ollie's offer to pay Charlie a million dollars.

The parties must intend to be bound by a contract. For a contract to exist, there must be a "meeting of the minds" of the parties regarding the terms of the agreement, and they must both intend to be bound by those terms. A court attempting to enforce a contract will look to the words and actions of the parties as evidence of their intent. What kind of a relationship do the parties have? Do they have a history of dealing in a particular manner? What expression of mutual consent have the parties made?

Of course, if a bid contains language

indicating that it is "preliminary," or "subject to" a condition that has not yet occurred, this is good evidence that the parties did not intend to form a contract. In the case of Ollie and Charlie, who met in a bar—a rather informal setting—it might be argued that Charlie thought he was merely helping a friend by giving him a rough estimate of what the house should cost, and that therefore Charlie did not intend to be bound by his word. His comments about his construction crew being able to start work, however, would probably sink this argument, since they seem to indicate that he was serious about taking the job.

Assuming that Charlie's words constituted a proper bid or offer, was Ollie's response sufficient to form a contract? For an acceptance to take place, it must be made by the party to whom the offer was made; that person must know of and understand the offer at the time he accepts; and the acceptance must be communicated to the person who made the offer. In addition, the acceptance cannot vary the terms of the original offer, or it will be considered a counter-offer. Ollie's response seems to meet these standards.

What If There's a Mistake?

Ollie noted that Charlie's figure was "much lower" than any other quote Ollie had received. This raises the question of whether Charlie might have made a mistake in his bid. If Ollie properly accepted the bid, thus forming a contract, is Charlie out of luck if his bid was based on mistaken assumptions?

Not necessarily. In some states, the rule is that if there is a mistake in a bid, and the mistake is essential and fundamental to the contract, it is possible that there was never a "meeting of the minds" between the parties, and therefore no contract was formed. If the contractor was not negligent in preparing the bid, and if the owner should have been aware of the mistake, then the contract may not be held to the mistaken bid.

Oral Agreements Can Be Binding

As Charlie and Ollie's agreement shows, a construction contract doesn't have to be in writing to meet the definition of a contract. (The exception would be if your state has a specific law requiring a written contract.) If a dispute arises, however, an oral contract can be more difficult to enforce than a written contract. The fact that Ollie and Charlie have not memorialized their understanding in writing doesn't mean that the contract is unenforceable. But because there were no witnesses to the conversation, it will simply be Ollie's word against Charlie's word if a dispute arises. Given that, it's best—as usual—to get it in writing. A careful preparation of the bid is the best route to take. ■

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