

UMBRELLA AGREEMENTS IN MINING

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Legal Briefings - By **Miriam D'Souza** and **Coralie Gouldson**

When should you use an umbrella agreement - issues and troubleshooting.

WHAT IS AN UMBRELLA AGREEMENT?

An umbrella agreement (sometimes referred to as a framework agreement or master agreement) sets out a framework for a project owner to request goods or services from time to time under an order (sometimes referred to as a purchase order, statement of work, package or similar). The terms of the umbrella agreement are agreed up front, with certain specified variables to be agreed on an order basis; for example, the volume of goods and services ordered, where they will be supplied or performed and the total price.

This type of contract model allows flexibility in respect of the type and volume of goods or services to be procured while removing the need to have a full contract negotiation each time an order is placed. Ideally, no new information will need to be negotiated when an order is placed as the framework for determining the variables will be set out in the umbrella agreement itself. For example, while the price for the order will need to be set out in the order, it will be based on rates agreed in the umbrella agreement, removing the need to negotiate on price.

WHERE CAN THINGS GO WRONG?

Umbrella agreements are certainly not new. However, they are susceptible to misuse given they involve multiple contracts being made under the single umbrella agreement. This is more problematic in the current market where work is less abundant than during the boom; companies are more likely to pursue a dispute than they may have been when there was more work in the market. For this reason, when drafting and negotiating an umbrella agreement, it is now even more important to ensure that it is drafted so as to minimise the risk of disputes.

With this in mind, we have set out below a high level checklist for project owners to consider when deciding whether to use an umbrella agreement and some issues to address when drafting an umbrella agreement.

TOP TIPS FOR YOUR UMBRELLA AGREEMENT

LIMIT THE SCOPE OF THE UMBRELLA AGREEMENT

Umbrella agreements are most useful where they involve supply of goods or services which are repeatable (to minimise the need for negotiation with each order and ensure that the terms of the umbrella agreement apply equally to all orders made under it).

For example, an umbrella agreement for the supply and installation of ore cars will work well; the project owner can order as many ore cars as it likes at any time and may choose to place a separate order for each operating site. Contrast this with an umbrella agreement which is put in place generically for “mining equipment” which does not specify the different types of mining equipment that can be ordered.

In this situation there is a greater chance that the terms and conditions agreed in the umbrella agreement will not be appropriate for a particular piece of equipment. Further, if the specific type of equipment is not specified in the umbrella agreement, it is less likely that pricing will be specified in the umbrella agreement, which means it will need to be negotiated each time an order is placed. This is not to say that this type of umbrella agreement does not work, but it requires additional contract management time to ensure that the risks are mitigated.

Given the importance of scope to the effectiveness of umbrella agreements, project owners should resist the temptation to use an umbrella agreement for an entirely different type of good, service or works which was not contemplated at the time of drafting the umbrella agreement. While it may seem desirable to use an existing umbrella agreement to minimise costs of negotiating a new agreement, there is significant risk involved with this approach. This is particularly problematic where an umbrella agreement drafted for the supply of goods is used for an order involving services or works (or vice versa), given that the terms of the umbrella agreement should be unique to whether the scope is for supply of goods, services or works.

STRIKE THE RIGHT BALANCE BETWEEN AGREEING TERMS UP FRONT AND AGREEING THEM AT A LATER DATE

An umbrella agreement usually includes:

- provisions that govern the process of agreeing and executing orders (that is, how the project owner will purchase goods and services from time to time);
- provisions that will be incorporated into each executed order; and

- a form of order, identifying the specific variable information which needs to be agreed for each order.

The first category of provisions will be binding on the parties from execution of the umbrella agreement, whereas the second and third categories will only apply when incorporated into an executed order.

In respect of the second category of provisions, this should include all provisions which remain the same across all orders (such as workplace health and safety, indemnities and compliance with standards and laws). The third category of variable information should cover the information which changes from order to order, for example, the volume of the goods or services, delivery date, the rate of any liquidated damages and the overall price for the order.

Some information (such as the limit of liability and other risk provisions) could either be agreed in the umbrella agreement or determined in each order, depending on the parties' preference. Project owners will need to weigh the benefits of allowing flexibility by agreeing these provisions in the orders against creating certainty by agreeing these provisions in the umbrella agreement.

It is also important to avoid any overlap between the umbrella agreement and orders. All umbrella agreements and orders should contain a provision providing that, to the extent of an inconsistency between the two agreements, the umbrella agreement (or order, depending on preference) prevails. However, such a provision does not guarantee the avoidance of a dispute where the umbrella agreement and order appear to cover a similar issue, so it is preferable to remove any overlap in the drafting process.

ENSURE THAT THE MECHANISMS WORK WITHIN YOUR BUSINESS PROCESSES

When drafting an umbrella agreement, it is important to consider the end users of the umbrella agreement and what other processes they need to manage in order to ensure the umbrella agreement is user-friendly and effective.

A typical umbrella agreement is drafted with a form of order attached as a schedule. However, often, end users of umbrella agreements are more familiar with issuing purchase orders from their existing purchasing system and may choose to issue a purchase order from that system to procure goods and services under the umbrella agreement rather than using the form of order in the umbrella agreement. Purchasing goods and services this way creates risk as all of the required variable information may not be included in the purchase order. Furthermore, often these purchase orders have terms and conditions printed on the back which lead to the risk of inconsistency between the terms of the umbrella agreement and the terms printed on the back of the purchase order.

ENSURE THAT NO REPRESENTATIONS ARE MADE ABOUT FUTURE WORK

One benefit of using an umbrella agreement is that a project owner is not bound to the provision of goods or services unless it elects to do so by executing an order. Project owners should ensure the umbrella agreement contains appropriate acknowledgements from the contractor that the project owner makes no representation about future work (unless the project owner is prepared to make promises about future work and be held to those promises).

KEEP COMPETITIVE TENSION

Using an umbrella agreement can reduce competitive tension if drafted such that the project owner must always use the contractor for goods or services covered by the umbrella agreement. Even where no such exclusivity exists, competitive tension may nevertheless be reduced where a contractor is aware that a project owner spent significant time setting up the umbrella agreement and may therefore be reluctant to look elsewhere (given the time and money required to renegotiate with a new contractor).

One way to overcome the issue of reduced competitive tension is to use umbrella agreements in a panel arrangement. This allows project owners to engage multiple contractors on separate umbrella agreements under which the project owner may engage any or all of the contractors for discrete packages of work. In order to enforce this competitive tension, a clause may be included in the umbrella agreement that acknowledges that each time the project owner requires goods or services, it will seek quotes from at least two members of the panel.

CONCLUSION

There are many other considerations to be taken into account when deciding whether to engage a contractor under an umbrella agreement. For this reason, umbrella agreements can take some time to refine and negotiate. However, once the umbrella agreement has been negotiated, the implementation of future orders is significantly easier, provided proper consideration is given when completing and executing each order to ensure it includes the appropriate information and represents a binding agreement between the parties.

For further advice on umbrella agreements please contact [Miriam D'Souza](#) or [Coralie Gouldson](#).

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