

The “As-and-When” Contracts – How to Contract when the Scope and Timing of Work is Uncertain

The variety of contract models that may be used for construction work is reflective of the broad range of projects undertaken by the industry and the flexibility needed to address pricing options. Where owners may require ongoing, but sporadic, maintenance services, or multiple routine pieces of work, or relatively small-value projects, the frequency, timing, value and scope of the work of individual assignments may not be fully known in advance. An option for parties wanting to engage in such projects may be to enter into “as-and-when” contracts. The “as-and-when” type of contract allows owners to request that the work contemplated by the contract be provided only if, and when, the work is required by the owner under pre-agreed general terms and conditions. We discuss some of the details of the arrangement below.

An “as-and-when” contract comprises two components: (i) the master contract that sets out the general conditions for the work, protocol for authorizing work, the payment mechanism, requirements and obligations regarding insurance and indemnities, procedures for dispute and other clauses of general character; and (ii) the project-specific authorization that details the scope, duration, location and other details regarding each specific project.

Settling the key contractual terms in the master contract helps the parties avoid renegotiating general terms and conditions each time that the owner requires a particular job to be performed. Thus, even if the exact scope of work, timeframe, location and costs may vary depending on the nature of the individual project that emerges, the parties are able to rely on the general conditions. Each time that a specific project is to be carried out, the details of its scope, duration, and location can be quickly and easily communicated through the project-specific authorization without the need for protracted negotiations. The project-specific con-

tract price will be determined based on the pricing terms already agreed on by the parties under the master contract. The project-specific terms and the master “as-and-when” contract combine to govern each specific project.

The “as-and-when” contract may be advantageous for parties for many different reasons, a key one being the efficiencies offered by having the general conditions settled up front. Where the owner requires a high number of similar and low-value projects to be performed over a period of several years, reaching an agreement up front on the general condition of the contract eliminates the duplication of efforts, costs and delay associated with the procurement, negotiation and contracting stages. Further, using an “as-and-when” contract helps the parties establish long-term working relationships which, in turn, may lead to more effective communication between the parties and more consistent and higher quality work product.

No form of contract is without its drawbacks, however. In this case, while the “as-and-when” contract may secure some certainty of contract, it may not necessarily secure a volume of work or revenue for contractors. This is because an “as-and-when” contract would typically include a clause that the owner does not guarantee a minimum volume or fixed amount of work. This may be difficult for some contractors to manage from the perspective of cash-flow and resource allocation. The very benefit of the “as-and-when” contract (to secure up front agreement on general pricing and general conditions) creates the disadvantage that there may not be a guarantee of any work that is actually commissioned by the owner. Additionally, an “as-and-when” contract may not entitle a contractor to

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exclusivity in supplying the procured services to an owner as the owner may still reserve their right to procure for similar work. Contractors should also be mindful of whether the contract may preclude them from participating in other competitive opportunities with the owner.

Given the variable nature of the industry, it is important for all participants to be familiar with the contractual tools available. An "as-and-when" contract is one option in the contract tool box that may be utilized by an owner and contractor seeking to have some up-front certainty as to their contractual arrangement where the specific scope, timing and frequency of projects must remain flexible. Ultimately, the risks/benefits associated with the use of an "as-and-when" arrangement need to be considered by the parties in each case to ensure some balance of both parties' interests.

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Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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Sonia is a founding partner of Civic Legal LLP, and practises in the areas of procurement, construction and land development, with a particular focus on tendering law, procurement fairness, construction contracting and use of standard form construction contracts. Sonia routinely provides advise on structuring and administering public tenders and competitive RFPs, managing contractor performance and lien issues and securing land tenure. She practised as a professional engineer for 10 years and worked on civil and geotechnical design and construction projects in British Columbia and abroad. She provides legal advice with practical insight by drawing upon her unique professional understanding of construction and engineering projects.

Sonia keeps a watchful eye on technological disruptions to the construction industry, and how these may impact the traditional relationships between parties, such as with the use of BIM technology and smart contracts.

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Marcela is an associate lawyer of the firm. Prior to joining Civic Legal LLP, Marcela completed her articles at a Vancouver litigation law firm. She gained extensive legal experience in advocacy by frequently representing clients in the Supreme Court of British Columbia. While completing her J.D. from the Peter A. Allard School of Law at the University of British Columbia, Marcela worked in the legal department of an international company where she was reviewing complex commercial agreements. Marcela also worked at a Vancouver boutique law firm specializing in real estate, corporate law and estate planning and completed a Master of Laws at the University of British Columbia.