

PRACTICE TIPS

Construction Contracts-A Checklist for Getting the Basics Right

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We sometimes overthink what our boss or client wants. As a young attorney, the first time I was handed a construction contract to review for a municipality, I attacked the task with enthusiasm. I spent days looking at every detail and nuance of the document. I dug through every part of the 400 pages that were incorporated into the contract. I analyzed the plans, the drawings, the specifications, the likelihood of success under the liquidated damages clause, potential ambiguities, and sundry other contractual elements.

When I brought the various issues to the attention of my boss at the time, a wizened City Attorney with many years of experience, she informed me that she merely wanted me to ensure they signed it correctly and included their bonds and insurance.

Her experience taught her that, despite the time we attorneys put into drafting and reviewing contracts, they are often not executed properly prior to beginning the work.

At the time, I would have been greatly assisted by a simple construction contract checklist. I eventually found a good list in a legal guide for municipal clerks and have gradually added more details to best suit my department's purposes.

Such a checklist is a powerful tool for reducing the time we spend reviewing each contract and ensuring that all departments contribute to the process. Here is a contract checklist modified for use outside of a single state:

1. The contract is signed by the contractor.
2. The numerical figure representing the amount of the contract agrees with:
- the resolution authorizing the contract,
- the amount described in words, and
- the remainder of the bid documents.

3. All blanks are filled in, except for the signatures of the City Manager or Mayor (as authorized by resolution), City Clerk-Secretary (attestation), and City Attorney (form only).
4. The contract (sometimes called a "Form of Agreement") includes all necessary ancillary contract documents. Construction contract documents will commonly include:
- Form of Agreement;
- General Conditions;
- Special Conditions;
- Technical Specifications;
- Standard Specifications;
- Completed Bid Forms;
- Completed Bid Sheet;
- Resolution Authorizing Corporate Contractor to Execute Contract;
- Federally Required Documents;
- Copy of Notice for Bids;
- Instructions to Bidders;
- Certificate of Insurance;
- Prevailing Wage Rates (if required);
- Performance Bond (if required);
- Payment Bond (if required);
- Drawings (often separate).

5. The full legal name of the contracting entity is shown in the contract. Following the legal name, the entity type and state of organization should be specified.
Examples:
- Billy Bob Thornton d/b/a Thornton Contracting;
- Able Contracting, LLC, a Texas limited liability company d/b/a Able Construction;
- Boll Construction, Inc., a Delaware corporation d/b/a Boll Constructors;
- Brown, LP., a Utah limited partnership;
- Bonanza Dirtworks, a Nevada limited liability partnership

6. The contractor's name on the contract matches the contractor's name on the bidand on the City Council action awarding the bid and authorizing the contract.
7. The corporate name on the contract matches the corporate name on file with the Secretary of State for the state in which company is organized.
8. If the contract was not approved by resolution of the governing body, why was it not necessary to be approved by resolution?
9. The project description on the contract corresponds to the resolution/minutes of the City Council action awarding the bid and authorizing the contract.
10. If the Contractor is not a corporation, the person who signed the bid is the same person who signed the contract.
11. If the Contractor is a corporation, limited partnership, limited liability company, the corporation name is exactly the same in all places it is listed.
12. An authorized officer with the company, such as the President or Vice-President, signed the contract. Some contract document forms will contain a copy of a resolution for the Board of Directors of the contractor's corporate entity to execute.
13. The signature page of the contract and the bonds contains the corporate seal of the company. A seal is not necessary for contract enforceability, but it is evidence of authenticity of the corporation's agreement In some states, a seal extends the time for bringing suit on the contract. If the corporate seal is absent, an explanation should be provided as to why is it absent.

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ning another car off the highway. That conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness. Running another vehicle off the road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues.

Petitioners attempted to discredit the officers' suspicion of drunk driving, with no success. While the Court acknowledged that the reported behavior might also be explained by, for example, a driver responding to "an unruly child or other distraction," it has consistently recognized that reasonable suspicion "need not rule out the possibility of innocent conduct." *United States* v. *Arvizu*, 534 U. S. 266, 277 (2002).

The majority disagreed that the absence of additional suspicious conduct, after the vehicle was first spotted by an officer, should dispel the reasonable suspicion of drunk driving. "It is hardly surprising that the appearance of a marked police car would inspire more careful driving for a time."

Under the totality of the circumstances, the majority found the indicia of reliability sufficient to provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road and was driving while intoxicated. That made it reasonable under the circumstances for the officer to execute a traffic stop.

DISSENT:

Justice Scalia, normally a reliable member of the Court's conservative cohort, wrote the dissent, which was joined by Justices Ginsburg, Sotomayor, and Kagan.

Nowhere did he discern the "sufficient indicia of reliability" that the majority had found. The 911 tip was completely uncorroborated, and the CHP knew nothing about the tipster—not her name, her address or even her phone number. The facts bore little resemblance to *White*, in which the tipster had predicted, with "the finest detail" the future movements of the drug-bearing suspect—here, anyone could have noted a license plate number and vehicle description of a pickup, and could have made the "amazing, mystifying prediction" that petitioners' vehicle "*would be traveling South on Highway 1*."

Scalia also had little patience for the argument that the 911 caller was more likely to be credible because she believed her identity would be discoverable. He challenged the majority to support such an assertion about 911 callers' state of mind.

Finally, he pointed out that the *sine qua non* of the traffic stop—criminal activity in the form of drunk driving—was nowhere to be seen. Petitioners had not even been accused of driving drunk. The tipster made no such accusation; she merely stated that the pickup had forced her off the road. Therefore, at the time the CHP officer saw the pickup and pulled it over, he had no reason to believe that the driver was drunk. The pickup driver's only 'crime' if in fact there had been one, was that he had driven recklessly some 30 minutes earlier. And that infraction, if it had in fact occurred, might have been caused by a distraction.

For the minority, there was simply no basis to make the traffic stop. It was the same group of dissenters who had objected to the use of mouth-swab DNA evidence from arrestees in the 2013 *Maryland v. King* decision, written by the same author. Scalia was no less outraged in this case.

He warned:

> Law enforcement agencies follow closely our judgments on matters such as this, and they will identify at once our new rule: So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop. This is not my concept, and I am sure would not be the Framers', of a people secure from unreasonable searches and seizures. I would reverse the judgment of the Court of Appeal of California.

Navrette v. California, No. 12-9490 (U.S. Apr. 22, 2014). ML

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14. The Contractor provides a copy of its Certificate of Insurance.
15. The insurer named on the Certificate of Insurance exists and is authorized to do business in the state.
16. The Contractor's correct name is shown on the Certificate of Insurance as the insured.
17. The insurance coverage is shown on the Certificate of Insurance and meets the minimum amounts required by the contract:
General Liability
$_____aggregate
$_____per occurrence
Automobile Liability
$_____ aggregate or
$ _____ for bodily injury
$_____ for property damage
Workers Compensation
Statutory Limits
18. If required by the contract, the Certificate of Insurance shows the City (or "Certificate Holder") named as an Additional Insured on:
General Liability
Auto Liability
19. If required by the contract, the Certificate of Insurance shows that subrogation is waived for:
General Liability
Auto Liability
Workers Compensation

20. If required by the contract, the Certificate of Insurance contains a statement that the insurer will mail at least 30 days' advance written notice of cancellation of the insurance policy to the Additional Insured.
21. If the contract requires a Payment Bond and/or Performance Bond, the following items are checked:

- The name of the contractor (the Principal) on each bond is exactly the same name as stated in the contract;
- The bonding company is qualified to do business in the state and is listed on the US Treasury Department list of approved sureties. The US Treasury list can be found at the following website: www.fms.treas.gov/c570/c570.html;
- The amount of each bond is the same as the stated amount of the contract;
- The contract to which each bond refers or the work to which each bond refers

matches the contract or work specified in each bond. If the contract has a title, the title should be described in the bond exactly as it is on the contract;

- The date of each bond is the same date as the contract~ or a later date;
- Each bond is signed by the both the contractor (principal) and the bonding company (surety);
- The names of the principal and surety are sealed. It is possible that the principal will not have a seal, but the reason for the lack of the principal's seal should be documented;
- The surety's seal contains the exact name of the surety. (Agents will occasionally use a seal from the wrong surety company.)
- The bond(s) is/are accompanied by a Power of Attorney, which authorizes the surety's signatory to execute the bond. The Power of Attorney should be checked for the following:
  - The Power of Attorney's authorization matches the bond. Generally, the Power of Attorney will contain a control number that will match the control number for the bond;
  - The person who signed as the surety on the Performance and Payment Bond is listed on the Power of Attorney as an Attorney-in-Fact.
  - Any bonds authorized pursuant to the Power of Attorney do not exceed the amount authorized by the Power of Attorney.
  - The Power of Attorney contains the seal of the surety.
  - The date of the Power of Attorney is the same as or prior to the date of the bond.
  - Usually, the Power of Attorney will be on distinctive paper. If not, there should be indicia of authenticity, such as a raised seal. If in doubt, call the surety to verify the authenticity of the bond(s) and Power of Attorney, and document the call.

This checklist provides the basics. It does not include the various statutory provisions that must normally be incorporated into the contract at the time of drafting. It also does not include the federally required provisions that we are so often expected to include in municipal contracts that use federal funds. However, getting these basics right will ensure that, when we discover a non-performing contractor, our first question need not be "Did they execute the contract?" ML

Cases *Cont'd from page 29*

hit was a "good faith, reasonable mistake" and that "no reasonable jury could find that Kim lacked reasonable suspicion to conduct an investigatory stop." The lower court also decided that that the tactics used by the officers were objectively reasonable in the context of a lawful investigatory stop, rejecting Green's unlawful arrest and excessive force claims. The court further determined that Kim was entitled to qualified immunity because Green had not established a constitutional violation.

HELD: The Ninth Circuit reversed the lower court's grant of summary judgment, finding that a rational jury could find that defendants violated Green's Fourth Amendment rights on the grounds of wrongful seizure, false arrest and excessive force. It further found that Sergeant Kim was not entitled to qualified immunity, at least until later in the proceedings.

DISCUSSION: In assessing whether Sergeant could claim reasonable suspicion, the Circuit Court focused on ALPR procedures. It was well established by the record that an unconfirmed hit on the ALPR did not, alone, form the reasonable suspicion necessary to support an investigatory detention; addition confirmation was required. The parties disputed whose responsibility it was to perform these additional steps: Defendants stated that it was the duty of the officer in the camera car, while Green argued that it was reasonable for the officer actually making the stop to perform these steps. The parties cited no SFPD policy that expressly placed the responsibility with either officer.

In the absence of such a policy, it was disputable whether an officer conducting a stop could reasonably rely on a lack of qualifying information from the camera car operator as a justification for making the stop without independent verification. Reasonable suspicion thus remained a triable issue, not ripe for summary judgment.

Green's detention was found to be de facto arrest without probable cause. It was a greater detention than a *Terry* stop. She was held at gunpoint, handcuffed and directed to her knees. The Ninth Circuit had previously held that "under ordinary circumstances, when the police have only reasonable suspicion to make an investigatory stop, drawing weapons and using handcuffs and other restraints will violate the Fourth Amendment." (citation omitted). Factors justifying such action included 1) where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight; 2) where the police have information that the suspect is currently armed; 3) where the stop closely follows a violent crime; and 4) where the police have information that a crime that may involve violence is about to occur. A belief that a vehicle has been stolen does not suffice. Viewing the facts in the light most favorable to Green, a rational jury could find that Green had been arrested using tactics were not reasonable given the totality of the circumstances.

Defendants also failed on the issue of excessive force. Green, a woman of 250 pounds, had been forced to her knees, handcuffed and surrounded by up to six officers with guns drawn. The test for evaluating the legitimacy of these tactics was "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." (citation omitted). By any standard, the Circuit Court found, these factors had not been satisfied, preventing a grant of summary judgment to Defendants.

The district court had found that Kim was protected by qualified immunity. The Ninth Circuit applied the standard test: (1) whether the law governing the conduct was clearly established and (2) whether the facts as alleged could support a reasonable belief that the conduct in question conformed to the established law. (Act Up!/Portland v. Bagley, 988 F.2d 868, 873 (9th Cir. 1993)). Both are questions of law to be determined by the court in the absence of genuine issues of material fact.

The first element was satisfied as a matter of law: it was clearly established that individuals may not be subject to seizure or arrest without reasonable suspicion or probable cause. As to the second question--whether Kim could reasonably believe that his actions were lawful, the Circuit Court saw significant issues of fact: "When viewing the facts in the light most favorable to Green, we cannot make a determination as a matter of law that Sergeant Kim 'could have reasonably believed at the time that the force actually used was lawful under the circumstances.' Instead, this question must go before a jury." (citation omitted).

Green v. City and County of San Francisco, No. 11-17892 (9th Cir. May 12, 2014). ML