

(Avoiding) The Pitfalls of Drafting ~~Ordinances~~Contracts – Predicting the Future and Avoiding Unintended Consequences

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Disclaimer

- Presentation represents views of the speaker and should not be construed as individual legal advice or to represent the views of any agency.
- Special thanks to my panel of expert advisers.



















The Agenda

- Finding and identifying the pitfalls.
 - Tips for things to do when drafting contracts.
- Avoiding falling into the pit.
 - Tips for things to avoid doing when drafting contracts.
 - Drafting includes reviewing a contract prepared by someone else.
- Stating the obvious:
 - Have a good library of road maps helps.
 - Develop a good set of standard form contracts
 - If you want copies of mine, send me an email. danhentschke@gmail.com
 - Update them regularly
 - Be prepared to alter or abandon them when appropriate
 - Municipal Law Handbook has numerous helpful practice tips

Warning

- Rules of contract construction that apply to contracts between private parties apply equally to government contracts.
- Contract approval is a legislative act, but
 - the rules of contract interpretation, not statutory interpretation, apply to the interpretation of contracts
 - (e.g., the rule that gives some deference to a government agency in a legislative context does not apply to contract interpretation). *Id.* at 461

Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes (2010) 191 Cal. App. 4th 435, 458, 361

Ready? Let's go!



Understand the “project.”

- Develop a clear understanding of the intended end result?
 - Don't travel alone.
 - (Rely on staff and others)
 - Plan your whole trip before you embark.
 - Try to insist on early participation in the project planning process.
 - Listen to but don't rely solely upon the advice of the technical experts.
- Identify the “deliverables.”
- Listen to what management is saying.

Consider the (potentially)applicable legal authority.

- Substantive authorization.
 - Government Code
 - Public Contract Code
 - Charter
 - Municipal Code
 - Purchasing Ordinance/Resolution
- Substantive limitations.
 - See above (e.g., GC § 53069.85, PCC § 7203 (damages for delay) PCC §§ 9204, 20104.2 (payments and claims resolution)
 - Labor Code (e.g., prevailing wage laws)
 - Civil Code (e.g. § 2782 relating to indemnity)
 - Grant Requirements
- Develop a checklist of statutorily required contract provisions.
 - E.g. PCC §§ 7100 – 7203; Local Ordinance

Carefully review the scope of work.

- Is it clearly worded?
- Is it internally consistent?
- Is the scope of work consistent with the other “contract documents?”
 - Inconsistency often occurs when the General Conditions or Technical Specifications are cut and pasted by the design professional firm
 - Or when specifications are reused from other projects and not properly vetted or coordinated with the manufacturers or suppliers – e.g. “It worked ok last time.”
- Are all the separate documents that constitute the Contract Documents clearly identified and is the priority of those documents clearly stated?
- Are the deadlines clear?
 - Are the consequences of failure to meet the deadlines clear?
- Are the deliverables clear?

Give same careful consideration to:

- The payment provisions
- Project schedule

Some thoughts on technical specs.

- Things can change rapidly in the construction world such as:
 - Technological advancements,
 - Software upgrades (which often occur during the course of a project),
 - Changes in a manufacture's relationships with subcontractors (e.g. a pump manufacturer that doesn't use a particular coating anymore - now it's something else that's more expensive. The specification was clear, but not based on reality. You don't find out until the middle of the contract because nobody checked. Now you're faced with the issue of whether to "stand on the contract" and hold the contractor accountable "because he bid it" or explain to management why we messed up the specification and need a change order.)

Some thoughts about deadlines

- Assuming everything will go perfectly is a bad idea.
- Keep the deadlines for key milestones and contract completion reasonable.
 - Delays during the design phase should not be deducted from the necessary construction period – they often are in order to meet an unrealistic project completion objective previously established.
 - The construction period needs to be a function of the necessary time to complete the project considering factors such as equipment procurement, environmental work restrictions and - how long it takes to build the components.
 - Include a reasonable amount of float for weather and unforeseen delays such as mistakes – assuming everything will go perfectly is a bad idea.

Enforcement of deadlines

- Never underestimate the value of a good contract manager.
- Liquidated Damages
 - If too low they will be inadequate to cover the most significant delay impacts. If too high they will encourage an unwanted contingency in bids and spawn unwanted litigation
 - Liquidated damages provisions appropriately related to key milestones
 - If it's a \$500/day delay – the LDs should be 500/day – not \$10,000/day.
 - Avoid using LDs to punish contractors
 - Be clear as to what the liquidated damages are for and specifically what needs to be done to avoid them
- Remember the statutory limitations discussed previously.
 - E.g. CC § 1671, GC § 53069.85, PCC § 7203

Character of worker clauses

- Anti-harassment / anti-discrimination clauses / anti-aggressive behavior / drug-free workplace
- Especially important for contracts where work is performed on agency premises
- The agency should have the clear authority in the contract to require removal of anyone who violates workplace rules (and confidence to exercise the provision)
- Consider including provisions regarding persons who consistently behave in an unproductive or disruptive manner or who are incompetent to perform the job

Insurance and indemnity

- Avoid outdated, confusing or over-reaching indemnity language. The indemnity provision should be enforceable under CC § 2782
- Review the insurance provisions with the risk manager to assure they are appropriate for the particular scope of work and that the insurance is commercially available

Carefully consider definitions

- Are definitions necessary (remember the common meaning rule)?
 - If the common meaning of a word is too broad or too narrow, a definition may be required.
- If you do include definitions, use the defined terms and use them consistently.
- Make sure the definition is complete.
 - For example, if a defined term is intended to include some things but not others, make sure that the exclusions are stated in the definition.

Write clearly

- Use plain English, short sentences, and active voice.
- Use the Oxford comma.
- Since we're talking about mutual "promises" I personally prefer "will" over "must" and "must" over "shall."



Proof read (and then have someone else proof read too)!

- Don't rely on spell check.
 - Proof reading is more than just checking for spelling and grammar.
- Comprehensively review the entire contract
 - Are the sections and subsections correct?
 - Is the punctuation correct?
 - Are there any duplications?
 - Is the contract clear and complete?
 - Does it accurately describe the obligations of each party in language that ordinary people can understand?
 - Are the cross-references correct?
 - Are the exhibits correctly identified?
- Have staff review the agreement too.

Things to avoid

- Using a sample contract or standard form without adapting it to the current project – one size may not fit all
- Including (or excluding) provisions because of political expedience
- Including extraneous provisions
- Recitals in general and “whereas” clauses in particular, unless necessary to the interpretation of the contract.
- Ambiguity, legaleze, run-on sentences, the passive voice
- Failing to include staff at every stage of the process
- Failing to take your time

Some final thoughts

- A contract is only as good as:
 - The competency of the contractor – Do your due diligence and include appropriate qualification requirements and hold tight to them.
 - The agency's contract manager. Particularly the CM's ability to:
 - Conduct effective meetings,
 - Regularly and respectfully discuss difficult and awkward issues, and
 - Create an accurate project record.
- Consider establishing a formal contract review team
- Maintain a good working relationship with the contract manager
- Help manage expectations throughout the entire contract process