



مدیریت کسب و کار در صنعت ساخت (Construction Business Management)

ماژول ۲: مدیریت کسب و کار

بخش دوم: مدیریت قرارداد

ارائه دهنده:

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What we will learn?

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- ☐ Requirements For a Binding Agreement
- ☐ A Few Generalizations About Contractors
- ☐ Know the Project Owner
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What we will learn?

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- ☐ Dispute Resolution
- ☐ Contract Termination by the Owner
- ☐ You and Your Subcontractor

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Contract Terms and Conditions

Contract terms and conditions

- ❑ At the **time of execution** of a construction agreement, the owner and contractor are **typically friendly** but that atmosphere can go **downhill in the course of a dispute**, and unless satisfactory resolution is reached it may evaporate completely.
 - ❖ This highlights the need for a **comprehensive contract**.
- ❑ This section discusses only **selected contractual issues** that in our experience **demand special attention** when it comes to signing a construction agreement and is **not intended** to provide a comprehensive list.

Contract terms and conditions

☐ Unless you are skilled in **interpreting legal documents**

you'll need to hire an **attorney** who specializes in **construction law**

to review any **new-to-you construction contract** and

go over it with you **before you sign it.**

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Requirements For a Binding Agreement

Requirements for a binding agreement

❑ **Lawyers caution** that for a construction contract to be **legally enforceable** the following conditions must be present:

1. Agreement between parties as to the meaning of the contract at the time of execution
2. The parties must have the legal capacity to form a contract
3. Sufficient consideration, or value

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Requirements for a binding agreement

- ☐ Make every effort to include your **entire agreement** in a written document.
- ☐ Once a **contract is executed**,
discussions you had beforehand, e.g., at a **pre-bid conference**,
are generally **not enforceable** if not written in the contract.
- ☐ Look at any proposed agreement as a **whole**.
 - ❖ The **apparent meaning** of a **sentence** you focus on in the agreement may be **changed by another sentence** in that **same agreement**.

Requirements for a binding agreement

- ❑ When you think you **need legal expertise** in dealing with contracts, hire your own lawyer—**not one** who represents **both** you and the owner.
 - ❖ Consulting your lawyer for advice **before plunging into unfamiliar territory** is much less costly in terms of both time and money **than hiring him** to get you out of the muck later on.
 - ✓ This is especially important **during your early years** in the business.

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A Few Generalizations About Contractors

A few generalizations about contractors

- ☐ According to lawyers:
 - ❖ **Terms** that have a **special meaning** should be defined in the contract.
- ☐ **Specifications** take precedence over the **drawings**.
- ☐ **Handwritten contractual terms** are given more weight than **typewritten terms**.
- ☐ **Typewritten** terms have priority over **printed ones**.
- ☐ If an **ambiguity** in the contract arises in the course of a dispute, the **courts** generally **rule against** the party who wrote the ambiguous language.

A few generalizations about contractors

- ❑ It might **seem** that the **contractor has the advantage** here when the owner draws the contract,
but if you **don't bring unclear issues** to the owner's attention and clarify them **prior to bidding**
you may be **responsible for any consequences** of the ambiguity during construction.
- ❑ The **owner** has an **implied duty to cooperate** with the contractor,
including coordinating the activities of suppliers, vendors, and others
the **owner has contracted** with but who have no direct link with the contractor.
- ❑ Another **implied duty** of the **owner** is to provide the contractor with **accurate and sufficient** plans and specifications.

Know the Project Owner

Know the project owner

☐ The **contract** must state the **owner's name exactly** as shown on his or his company's

1. Corporate registration,
2. Financial statements, and
3. Any other documentation you rely on.

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Getting Paid

Getting paid

❑ In a **perfect world** the owner

- ❖ Hands you a trouble-free building site,
- ❖ Develops a clear and accurate set of drawings and specifications,
- ❖ Arranges financing including contingencies for change orders,
- ❖ Offers you a contract that allocates the risk fairly between you and him, and
- ❖ Pays promptly when you submit your applications for payments.

All of your employees, subcontractors and suppliers perform as expected, and there are no delays on the project.

Getting paid

❑ Sounds great, doesn't it?

- ❖ Of course, in the **real world of construction** you have to prepare for **every one** of those conditions and **more** to go **against you**, and the **time to prepare** for that is **before** you **commit** to the owner.
- ❖ **Do not wait until after you sign** the construction agreement, **begin work**, or are ready to apply for **your first progress payment**.

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Getting paid

- ☐ **Even the best preparation** does not guarantee that your applications for payment will be paid on a timely basis,
but there are **steps you can take** to improve your odds.

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Getting paid

☐ Be certain the construction agreement states:

1. When you may apply for progress payments
2. The method for computing the amount due
3. The documentation you're required to submit along with the application
4. The amount of retainage the owner is allowed to withhold (the percentage preferably decreasing as the project progresses)
5. Where, to whom, and by what means to send your application for payment
6. When the owner is required to pay a properly submitted application for progress payments and final payment (i.e., the maximum number of days after he receives your application)
 - ❖ The requirements for final payment application, which are usually different from progress payments

Getting paid

- ☐ **Paying all** of your subcontractors and suppliers for amounts included in your current application for payment can **cause you a logistical** and especially a **cash-flow problem**.

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Getting paid

☐ If you're **required to sign** a lien waiver or claims waiver

before you receive payment,

state in your waiver that it is **conditioned on your receipt** of the payment it covers.

❖ Be certain that **nothing in the owner-contractor** agreement limits or prohibits your right to place a lien on the premises.

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Getting paid

❑ Here are a few **non-contractual issues** to explore in the interest of **getting paid** for the work you do.

1. Where is the owner's money coming from? Bank financing? Cash in the bank?
These are legitimate questions the owner should be willing to answer and document to your complete satisfaction.
2. Will the owner's construction lender agree to set aside funds adequate to cover your contract amount plus reasonably estimated contingencies?
3. What is the owner's track record for dealing with and paying contractors?
4. Who in the owner's organization is authorized to approve change orders?
5. What are the requirements for placing liens in the state and county the project is located in?

Getting paid

☐ Here are a few **non-contractual issues** to explore in the interest of **getting paid** for the work you do.

6. If the owner's lender requires you to sign an agreement that you will complete the project in the event the lender takes it over due to default of the owner's obligations to the lender,

does the lender agree to first pay you for any work done to date for which you have not been paid?

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Commencement/Completion Dates

Commencement/Completion dates

- ☐ The agreement should state
 1. The beginning date for the project,
 2. The number of days allowed for completion, and
 3. The provisions for time extensions for excusable delays.

- ☐ If the agreement provides for a Notice to Proceed to be issued by the owner or architect,

it should state the **number of days** between the notice and the commencement of the construction clock.

Owner Delay

- ❑ When an owner causes a delay, the **contractor** is usually entitled to a **time extension** and **compensation for his costs** that result from the delay unless the contract language prohibits it.
- ❖ Therefore, astute owners try to include a “**no-damages-for-delay**” clause in the owner–contractor agreement,
but you should **negotiate this out of the contract** as it unfairly places risk on you.

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Owner delay

- ☐ Even if a **no-damages-for-delay clause** is present in your agreement, you may be entitled to payment by the owner for delays caused by
1. Defective plans and specifications or
 2. His failure to supply labor or materials he's responsible for,
 3. Make the site accessible, or
 4. Pay you as agreed.
- ❖ These are known as compensable excusable delays.

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Contractor Delay

Contractor delay

- ❑ In the event of **late completion** of a project, the owner may suffer **consequential costs** he would like to **recover from the contractor**.
- ❑ Consequential costs might include **loss of the revenues** the owner would have realized between the contractual completion date and the actual completion date, and **additional interest on loans**.
- ❑ Delays caused by **unavoidable events** such as exceptionally bad weather, changes in the work, and acts of God are generally excusable unless otherwise provided by the owner–contractor agreement, but in the case of unexcused delays the contractor may be liable for the owner’s actual damages.
- ❑ It is not hard to imagine that the **owner’s losses** can **quickly become large**.

Changes in the Work

Changes in the work

☐ In order to make design changes, to **correct errors in the drawings**, and for other valid reasons,

project owners must have the **right to require changes** in the work after the **owner–contractor agreement is signed**,
with **appropriate adjustment** in the contract amount and time.

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Changes in the work

- ❑ You can **strengthen your claims** for payment for extras by taking the following into account **before doing the extra work**:
 - ❖ The person ordering you to do the extra work must be duly **authorized** to do so.
 - ❖ This may seem obvious, but it is frequently a matter of dispute.
 - ❖ If the construction **agreement does not name** the person or persons having this authority,
 - try to **reach an understanding with the owner** before or as soon as possible **after the job starts**, and
 - confirm it in writing to him and inform **your project manager and job superintendent** and others in your company who need to know.
 - ❖ You risk not getting paid for the work you perform without proper authorization.

Changes in the work

❑ You can **strengthen your claims** for payment for extras by taking the following into account **before doing the extra work**:

❖ The need to perform extra work is **often initiated** by

1. The **contractor** when his project manager or job superintendent comes upon a situation that **doesn't work according to plan**, or
2. The **owner wants** a change in the design.
 - ✓ **Change authorizations** often happen via **telephone or other informal** communication when it is **not practical to wait** for a formal change order to be drafted and signed before doing the work.
 - ✓ All too often, **contractors proceed** with the work after receiving approval by **word of mouth** and assume the **formal change order will come**.

Changes in the work

❑ You can **strengthen your claims** for payment for extras by taking the following into account **before doing the extra work**:

- ❖ This is **risky**. If you **make the judgment call** to proceed on faith,
 1. First be sure the oral (verbal) “approval” comes from a duly **authorized person**,
 2. Then **follow through immediately** to confirm the change in writing while the details are **fresh in the minds** of all involved.
- ❖ **Do not use the convenient**, open-ended formula for disaster we’ve all fallen for:

“Don’t worry about the cost right now, we’ll work it out later.”

Changes in the work

❑ You can **strengthen your claims** for payment for extras by taking the following into account **before doing the extra work**:

❖ **Delay in formalizing** a change order sometimes means

- ✓ **Lost or forgotten changes** that will never be billed, or
- ✓ **Time-eroded details** that may result in **disputes or**
- ✓ **Down-negotiated extra costs.**

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Changes in the work

❑ You can **strengthen your claims** for payment for extras by taking the following into account **before doing the extra work**:

❖ To be **entitled to payment**,

you must be able to **show** that the **owner's change order**
amounted to a change in the contract documents and to
prove **how much it cost you**.

○ You must **not have caused** the situation that requires the **extra work**.

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Changes in the work

❑ You can **strengthen your claims** for payment for extras by taking the following into account **before doing the extra work**:

❖ While owners are entitled to require changes, the **changes** must be within the **general scope** of the underlying contract.

✓ An owner may require you to **increase the size of a building** under contract (within reason),

but he is **not entitled to require you**, for example, to **construct a second building** on another tract of land.

Changes in the work

❑ You can **strengthen your claims** for payment for extras by taking the following into account **before doing the extra work**:

- ❖ As a niche contractor working with many customers repetitively,
I **tried to minimize change orders** by sometimes absorbing relatively small extra costs even when a claim was justified.
- ❖ Effective prior planning and continuous communication
increase the **owner's confidence** that your ultimate charges for the extra work are **fair and reasonable**,
which is especially **important for contractors** who work with **repeat customers**.

Constructive Change

Constructive change

- ❑ A **constructive change** occurs when the owner requires the contractor to do work that is **different from that required** by the contract documents.
- ❑ Here are examples of **constructive change**:
 - ❖ When the contractor performs work based on the owner's defective plans and specifications and must correct it
 - ❖ When the owner denies the contractor a justifiable extension in the construction completion date
 - ❖ When the owner requires the contractor to do extra work due to the owner's misinterpretation of the contract documents

Constructive Change

- ❑ The contractor may **claim payment for work** he performs under these circumstances, but **constructive change** is often a matter of owner–contractor dispute.
- ❑ This highlights the **need for timely notice** to the owner and thorough **documentation** of the circumstances that constitute the constructive change.
- ❑ **Project owners** may try to shift the risk of **changed conditions to the contractor** by a provision in the **bidding and contract** documents.
 - ❖ Be alert to this and don't accept it.

Differing Conditions / Changed Conditions)

Differing conditions / changed conditions

- ☐ Another important **special case of changes** in the work is that of **differing conditions**.
- ☐ A differing condition is a physical condition that is discovered in the course of construction that was not
 1. Apparent or believed to exist or
 2. Reasonably expectedat the **time of bidding**.

Differing conditions / changed conditions

- ❑ Your **construction agreement** should contain a clause that describes how **differing conditions** will be handled.
 - ❖ Without this, you may find yourself **eating the associated costs**.
 - ❖ In the **absence** of a differing conditions clause, **insist on** a blanket disclaimer of responsibility for **concealed or unknown conditions** in your bid or in the contract.

Differing conditions / changed conditions

☐ You may have **trouble** making a **case** that a condition meets the concealed test

1. If **other bidders** on the project detected and noted it to the owner, or
2. If it was **discussed** in a pre-bid meeting that you did or did not attend.

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Differing conditions / changed conditions

- ❑ You must **thoroughly inspect** the premises of a project at the **time of bidding** and **report** to the owner or architect or CM any **discrepancies** between the planned work shown on the bid documents and the actual conditions observed on the site.
- ❖ This gives the **owner the opportunity to alter** his design or otherwise change course **before** making contractual, financial, and other possibly irreversible commitments to a project that may **not be workable as planned**.

What to do upon discovering differing conditions / changed conditions

- ☐ If **you discover** differing conditions after committing to a project, there are steps you should take to **protect** or **improve** your **chances** of getting paid for any required changes.

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What to do upon discovering differing conditions / changed conditions

□ First,

1. **Immediately stop work** on the portion of the project affected by the differing conditions and
 2. **Protect it** from any further disturbance so that tests and evaluations can be made.
- ❖ **Do not take it on yourself** to “just go ahead and fix” what appears to be a **simple** and **insignificant** problem,
- as you may find yourself bearing the **full cost of correcting** both
1. The original problem and
 2. Any direct and consequential conditions resulting from your “fix,”
- the owner's argument probably being that you have **denied his other alternatives**.

What to do upon discovering differing conditions / changed conditions

- ☐ Promptly **notify** the owner of the differing site condition by phone **and** in writing,
making it clear in your notice that you **believe** differing site conditions exist.
- ☐ Do **not assume** that any **meetings** or **discussions** you've **had** about this situation
fulfill the notice requirement.

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What to do upon discovering differing conditions / changed conditions

❑ **Thoroughly document** the differing condition including

- ❖ Date and time,
- ❖ Description of the condition and how it was discovered,
- ❖ Photos,
- ❖ Witnesses, and
- ❖ A description of other circumstances such as weather, and
- ❖ Any action taken by you, your employees, your subcontractors, and others before and after discovery.

What to do upon discovering differing conditions / changed conditions

❑ In some cases an owner may try to **shield** himself from responsibility for the accuracy of the contract documents, including drawings, specifications, subsurface data, etc., and

impose the contractor with the **consequences** of any errors or omissions.

- ❖ Lawyers call this an “exculpatory” clause.
- ❖ I would not accept such a provision.
- ❖ Note that if the **contract does not contain** an exculpatory clause in favor of the owner,

the **owner is responsible** for the accuracy of the plans and specifications

even if not so stated in the agreement.

What to do upon discovering differing conditions / changed conditions

- ❑ As mentioned above, **once you begin the work** required by a changed condition or any other change order, maintain
complete, detailed, and accurate **cost records**.
- ❑ Consider using separate files and accounting cost codes for **change order work**.
 - ❖ In some cases it may make sense to
 1. **Arrange** for continuous or periodic independent **verification** during the work process or
 2. **Require** the owner to have a representative present during the work.
 - ✓ Of course, **judgment** is required: Minor or straightforward change orders may **not require** such extensive procedures.

What to do upon discovering differing conditions / changed conditions

- ❑ Your chances for **satisfactory resolution** of change order payment dim if **you** and the **owner fail** to follow effective procedures, beginning upon discovery of the underlying condition.
 - ❖ The process should begin with
 - ❖ A complete **understanding of the problem** by all involved parties,
 - ❖ The proposed resolution,
 - ❖ The desired outcome,
 - ❖ The work process,
 - ❖ The overall impact on the job schedule, and
 - ❖ A clear statement of the method for computing the payment you will be entitled to for the extra work.
- ❑ This should be put in writing and signed by **all parties** involved at the start.

What to do upon discovering differing conditions / changed conditions

1. If the differing/changed conditions **clause** in your contract is **not clear** as to its application to the situation at hand,
2. If your contract does **not include** such a clause at all, or
3. If the **potential impact** of an actual changed condition situation **concerns you**,
discuss how to proceed with your **lawyer**.

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Insurance

- ☐ Ask your insurance agent to review any **proposed owner contract** to be certain your coverages **meet all requirements** for the project.
- ☐ **Require** the owner and all subcontractors to name you as “**additional insured**” on all their insurance policies related to the project, and **obtain** the respective policies and have your **insurance agent examine** them to be sure you are properly protected.
- ❖ Having insurance certificates that name you as “additional insured” is mandatory, but they alone do **not explain your coverage**.

Indemnification

❑ Indemnification is an agreement that provides for one party to **bear the costs** for damages or losses of a **second party**.

The contractor is almost **always** required to **indemnify the owner** to some extent.

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Indemnification

❑ Some indemnification clauses require the **contractor** to **indemnify** the **owner**

even if the owner is **solely responsible** for the loss.

❖ Such a provision is **unacceptable** to the **contractor**.

✓ An **acceptable form** of indemnification requires the contractor to
“**indemnify and hold harmless**” the owner against claims

caused jointly by the contractor or the subcontractors and
the owner.

- ☐ In general, if you're required to **“hold harmless”** another party,
you are **responsible** for any and all **damages** suffered by that party.

- ☐ You should **contractually limit** your exposure to the **owner's claims** for consequential or indirect damages.

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Indemnification

- ☐ Follow the general rule to **not agree** to any **indemnification provision** that cannot be covered by insurance.
- ☐ **Require** your **subcontractors** to indemnify you and the owner to at least the extent that **you are required** to indemnify the owner.
- ☐ When faced with any **unfamiliar indemnification clause**, have it looked at by your insurance agent and maybe even your construction attorney.

Warranty Obligations

Warranty obligations

- ❑ A construction agreement may contain express warranties that extend the contractor's obligations **beyond a specific time period**.
- ❑ Some warranties that do **not specify** a time **limitation** might not come into play until a **defect is discovered**, which could occur **years after completion** of the work.
 - ❖ Such warranty provisions highlight the **need to**
 1. **Carefully examine** the bid documents and contract documents and
 2. **Address issues** of concern by limiting their effect through
 1. Insurance,
 2. Contractually, or
 3. By taking their potential cost into consideration in your bid and in the contract amount.

Limitation of Liability

Governing Law

Dispute Resolution

Contract Termination by the Owner

Limitation of liability

❑ Owners and contractors alike may be responsible for “**consequential**” damages unless waived by the parties.

❖ Examples of consequential damages the contractor may suffer if not waived include

the owner’s loss of income, profits, financing, and reputation resulting from acts of the contractor.

✓ Insist on a **waiver of consequential damages** and **consider forgoing** the project if the owner will **not agree**.

The AIA and AGC agreement forms include a waiver of consequential damages.

☐ The **agreement should provide** that it will be governed by **laws** of the **state** in which the **project is located** or in your state.

❖ **Avoid** a **third state**, such as where the **owner's corporate headquarters** are located.

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Dispute resolution

❑ According to **Smith, Currie & Hancock LLP's Common Sense Construction Law**,

“The key to quick resolution of disputes is the use of systems designed to collect, preserve, and organize information, including documents, throughout the project.”

❑ It should be your policy **from the beginning** to establish and maintain such systems.

❑ If **you wait until you need** them in a dispute it may be **too late**.

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Dispute resolution

❑ Disputes and disagreements are virtually a certainty in construction, but you can **improve your chances of being dragged through litigation** by implementing the following policies and procedures:

- ❖ Approach disputes with reason and logic rather than **hostility** and **accusation**
- ❖ Be selective in the project owners you work for
- ❖ Be thorough in employee selection, training, and retention
- ❖ Build a reputation of fair and honest dealing
- ❖ Build trust and goodwill among your customers, employees, subcontractors, and others you work with

Dispute resolution

❑ Disputes and disagreements are virtually a certainty in construction, but you can **improve your chances of being dragged through litigation** by implementing the following policies and procedures:

- ❖ Include **pertinent notes** in your bid proposals when permitted, to avoid surprises during construction
- ❖ Establish and follow good documentation practices
- ❖ Have pre-construction discussions with project owners in which potential problems may be anticipated and dealt with up front
- ❖ Keep lines of communication open among all parties

Dispute resolution

- ❑ Disputes and disagreements are virtually a certainty in construction, but you can **improve your chances of being dragged through litigation** by implementing the following policies and procedures:
 - ❖ Recognize that it is sometimes **better to swallow a bitter-tasting** settlement pill than to be dragged through the legal system by the emotions that usually scream revenge
 - ✓ Recognize where **giving a little** may buy a lot of goodwill;
this is the **alternative to winning** an argument over a relatively **insignificant** change order and losing a customer
 - ❖ Screen subcontractors
 - ❖ Use capable cost-accounting systems and procedures

Dispute resolution

❑ **Litigation** should be the **last resort** in any construction dispute.

- ❖ Include **alternatives** to **litigation** in your contracts that must be exhausted **before either party** can force litigation.
- ❖ Both the AIA and the AGC standard owner/contractor agreement forms provide for alternative dispute resolution.

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Dispute resolution

☐ Contracts often include a provision that the owner may require the contractor to **proceed with the work in the event of a dispute.**

❖ Decline this if you can in order to **keep your options open.**

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Contract termination by the owner

❑ The **owner may terminate** your construction agreement for default and, if provided for in your contract, for his “**convenience.**”

❖ Be certain the **contract**

- ✓ Defines events that constitute default,
- ✓ Establishes notice provisions, and
- ✓ Provides reasonable time for you to cure the default.

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Contract termination by the owner

❑ If the owner has the **right** to terminate for convenience, the contract should spell out the **payment you will be entitled to**,

including **whether you will receive** anticipated overhead and profit (as if the job had progressed to completion).

❖ Your **minimum requirement** should be that you are “made whole,”

i.e., **returned to your circumstances** that existed prior to the project.

✓ Your **construction attorney** will suggest the appropriate terms.

You and Your Subcontractor

Subcontractor qualification checklist

☐ Determine

- ❖ The subcontractors' length of time in business,
- ❖ Suppliers and contact information,
- ❖ Equipment owned,
- ❖ Financial information, and
- ❖ A list of general contractors you can call for reference. Check all references.

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Subcontractor qualification checklist

- ☐ Once you determine a **subcontractor's ability**, it is up to your project manager and field manager to require him to **perform at that level or better**.
 - ❖ A subcontractor **may perform no better** than is required or expected of him.
- ☐ Determine which of your **subcontractors' foremen** are the most effective on your projects and **demand them** on your future projects as a condition of the subcontractor doing your work.

The contractor–subcontractor agreement: Special considerations

- ❑ Use a **subcontract agreement** that addresses **the spectrum of situations** that may result in disputes.
- ❖ When a **dispute arises** you can yield on a **tough provision in your subcontract**, if necessary, to maintain fairness to the subcontractor;
but in the **absence of a contractual provision** that would have protected you, you **can't demand fair treatment** from an unreasonable subcontractor.

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The contractor–subcontractor agreement: Special considerations

☐ Subcontracts should be made to

1. **Conform** with the prime contract between the **contractor** and the **project owner**, and
2. Must be **revised** in **accordance** with the changes made to the prime contract throughout the **course of the project**.

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Pass-through or flow-down clause

- ❑ This **binds** the subcontractor to the contractor as the contractor is bound to the owner.
- ❖ **Without a pass-through clause**, you may be **liable for conditions** imposed on you by the owner that you **cannot require the subcontractor** to follow.
 - ✓ For example, the **owner–contractor agreement**, or prime contract, may require the **contractor** to **“permit only skilled persons to perform the work.”**
 - The **subcontract pass-through clause** imposes that requirement on the subcontractor.

Pass-through or flow-down clause

- ❑ **Structure** your pass-through clause so that in the **event of termination** of the prime contract by the owner,
 - your **payment obligations** to the subcontractor are limited by the amount you are able to collect from the owner on the subcontractor's behalf.
 - ❖ No **direct contract** exists between the owner and the contractor's subcontractors and vendors.

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Scope of work

- ❑ It is **not sufficient** to state in the subcontract that the subcontractor “**shall perform all work in accordance with the plans and specifications.**”
- ❑ **Each subcontract** should include the following:
 - ❖ The **project owner’s description** of the subcontractor’s work as written in the general contract
 - ❖ **Items of work** included in or excluded from the subcontractor’s scope of work **when different from the plans and specs**
 - ❖ **Clarifications** as necessary to **assign responsibility for items** of work **not** clearly assigned to a designated trade
 - ❖ **Work** that is necessary for a **complete job** but is **not included** in the plans and specifications

Scope of work

- ❑ It is **not sufficient** to state in the subcontract that the subcontractor “**shall perform all work in accordance with the plans and specifications.**”
- ❑ **Each subcontract** should include the following:
 - ❖ Method for **resolution of conflicts** that may occur between different parts of the subcontract, i.e., agreement as to
who will have **authority to make definitive decisions** that the contractor and subcontractor **agree to submit to**
 - ❖ Include subcontract language that **requires the subcontractor** to work as **directed by you.**
 - ✓ This provides for change order work.

Changes to the subcontract

- ☐ The subcontractor may be **entitled to payment** for his additional **costs** and/or a **time extension** when **changes** are made to the subcontract.
- ☐ The subcontract should specify **which employees** of the contractor are **authorized** to order changes and any limitations on amount.
- ☐ It should also **name the subcontractor employees** who have authority to commit the subcontractor.
- ☐ Include the **method for computing the amount** of overhead and profit the subcontractor is entitled to for **authorized changes**.

Changes to the subcontract

- ☐ Include a provision that the **subcontractor** is **not entitled to payment for change**

order work

unless authorized in writing by the contractor's designated representative **before** the subcontractor does the work.

- ❖ Note that **you may lose your ability** to use this provision to **deny payment** in a particular instance

if you have **not enforced** the provision consistently.

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Changes to the subcontract

❑ **Memories fade with time**, as do your chances of getting paid by the owner for extra work.

❖ The **subcontract** should specify, and
you should **enforce**, a strict timetable and procedure
by which the subcontractor submits the **required**
documentation
for change orders to you for your **use in billing the owner**.

Conditions for payment to subcontractor

☐ Specify

1. **The documentation** the subcontractor must provide and
2. Other preconditions for
 1. Interim and final payments, and
 2. The time frames,
 3. Forms to be used, and
 4. Location to which they must be submitted to you.

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Conditions for payment to subcontractor

☐ Require the **following documents** from **subcontractors**:

❖ Subcontractor's lien waiver

- ✓ You can require this for **all payments** including the current draw or, alternatively, for amounts the subcontractor has **been paid prior to the current one.**

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Conditions for payment to subcontractor

☐ Require the **following documents** from **subcontractors**:

❖ Subcontractor's, suppliers' and sub-subcontractors' lien waivers

✓ **Vendors** to your subcontractor should be **named** by your subcontractor at the time the subcontract is signed or afterwards, and

you should require your subcontractor to provide **lien waivers from them**.

✓ Also, there is **nothing to prevent you** from occasionally calling your **subcontractor's vendors** to confirm that **he is paying** them as agreed.

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Conditions for payment to subcontractor

❑ Require the **following documents** from **subcontractors**:

❖ Subcontractor's affidavit

✓ Require the subcontractor to provide a **statement certifying** that he has **completed** the work

included in his **current payment application** in **accordance** with the **contract documents**;

1. That all labor, materials and services have been paid for; and
2. That he has complied with all federal, state, and local laws,

Conditions for payment to subcontractor

❑ Require the **following documents** from **subcontractors**:

❖ Subcontractor's certificate of insurance

- ✓ Have this in hand **before the subcontractor starts work** at the jobsite.
- ✓ Accept only **original certificates signed** by the subcontractor's insurance agency, and which **name the contractor as "Holder"** and provide for at **least thirty days written notice** to the contractor before the insurance may be cancelled.
 - The **notice provision** is important.
 - We once had a subcontractor on a project whose **insurance was cancelled during the project**, and we discovered **too late** that we had not required **thirty-day notice prior** to any cancellation.

Pay-if-paid

- ❑ Contractors prefer to structure subcontracts so that the contractor pays the subcontractor **only if the contractor receives payment** from the owner, arguing that they should **not be stuck** with paying bills that the **owner doesn't pay them for**.
- ❖ **Construction lawyers** say that a contractual provision to this effect **usually will not be upheld in court** **unless** the pay-if-paid provision makes it **crystal clear** that it is the **intent** of the **parties** that the contractor is not obligated to pay the subcontractor if the owner does **not pay the contractor**.

Pay-if-paid

- ❑ If **you intend to include** a pay-if-paid provision in your subcontracts, it should be written as follows, according to Smith, Currie & Hancock LLP's Common Sense Construction Law:

... that the owner's payment is a 'condition precedent'; that the subcontractor expressly accepts the risk that the owner may not pay the contractor; that the subcontractor relies for payment on the credit and ability of the owner to pay; and [if applicable] that the contractor's payment bond surety will be obligated only to the same extent as the prime contractor.

Pay-if-paid

☐ **Before agreeing** to such a provision, a **sensible subcontractor** is certain to factor what he considers the **risk of non-payment** into his price.

Some courts have **refused** to uphold pay-if-paid clauses, and some states have laws that make them **unenforceable**.

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Delay damages

- ☐ The **subcontract** should **limit** any delay damages payable to the subcontractor as a **result of owner delay** to a **percentage** of the amount received by the contractor from the owner.

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- ☐ Specify the **percentage of retainage** to be withheld from the subcontractor's payment.
- ❖ The **amount of retainage** the contractor is allowed to withhold may be **regulated by law** in some states.

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Calculation of payment amount

❑ Leave **nothing open to interpretation** in setting forth in the subcontract **how the amount due** to the subcontractor for **progress payments** is **computed**.

❖ A reasonable method is to

- ✓ Add the value of labor, materials, and equipment incorporated into the project,
- ✓ Plus the value of materials stored on site and paid for, plus the subcontractor's markup, and
- ✓ Subtract the value of retainage on the current application and any prior payments made to the subcontractor.

Terms for final payment

- ☐ Spell out **when** the subcontractor will be **paid the final amount due**.
- ☐ The following should be included in the **conditions** required prior to final payment to your subcontractor:
 - ❖ Completion of all work included in the subcontract and any changes, including punch lists
 - ❖ Written acceptance of the work by the owner (and architect, if applicable)
 - ❖ Final payment by project owner to contractor
 - ❖ Subcontractor's waiver of lien rights

Terms for final payment

- ☐ Spell out **when** the subcontractor will be **paid the final amount due**.
- ☐ The following should be included in the **conditions required prior to final payment** to your subcontractor:
 - ❖ Subcontractor's release of claims against contractor
 - ❖ Subcontractor's submittal of all equipment warranties and operating manuals
 - ❖ Subcontractor's submittal of as-built drawings
 - ❖ Other requirements specific to the project as applicable

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☐ **Indemnification** is the concept under which **one party guarantees another party** against certain losses.

☐ Your subcontractor should be required to indemnify

- ❖ Your firm,

- ❖ The owner, and

- ❖ Your agents and representatives

against damages caused **partially or wholly** by

- ❖ The subcontractor or

- ❖ Anyone directly or indirectly working for him.

Termination for convenience

❑ Provide that you have the **right to terminate** the subcontract **without cause**.

❖ In that case, the subcontractor may be entitled to

- ✓ Compensation for work in place,
- ✓ Paid-for materials stored at the jobsite, and
- ✓ Overhead and profit earned to date.

○ **Without a subcontract provision** to the contrary, the subcontractor may argue that

he is **entitled to** overhead and profit **as if the contract was fulfilled** and to other compensation.

Subcontractor default

- ☐ The subcontract should specify **certain circumstances** that constitute **default by the subcontractor** and give the contractor the **express right to terminate**.
- ☐ These circumstances may include but not necessarily be limited to the subcontractor's:
 - ❖ Failure to supply enough labor and materials
 - ❖ Failure to pay for labor and materials as agreed
 - ❖ Disregard for laws, ordinances, and regulations

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Subcontractor default

- ☐ In giving **notice of termination** or **impending termination** due to subcontractor default,
use the word **“default”** and
strictly follow the subcontract terms for giving any **notice**.
- ☐ If a **surety** has provided performance and/or payment bonds for the project, they probably **obligate** you to **notify** the surety.
- ☐ **Notify the subcontractor’s bank** if you have agreed to do so.
- ☐ **Your failure to give notice** to a party as required gives that party a **defense**.

Subcontractor default

☐ **State** in the **subcontract** that you are entitled to deduct your expenses,

including **attorney's fees**,

resulting from the **subcontractor's default** from the amount you would otherwise **owe the subcontractor**, and

that the subcontractor is required to **reimburse you if your expenses exceed** the amount due to him.

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Notice of default

- ☐ Specify **how notice** is to be given by the contractor to the subcontractor in an **event of subcontractor default**.

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☐ Specify **how the subcontractor may “cure”**

1. A material breach, and
2. The amount of time he is allowed to do so after being given notice.

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Contractor alternatives

- ❑ Provide in the subcontract for **various courses of action** available to you **if the subcontractor does not cure** the default within the allotted time. These may include:
 - ❖ **Bringing in a second subcontractor** to supplement the subcontractor's work or to **take over some part** of the subcontractor's work
 - ❖ **Terminating** the subcontract, including taking **possession** of the subcontractor's **materials** and **equipment** and completing the job with **another subcontractor**
 - ❖ **Advancing funds** to the subcontractor for his use in continuing the project (this option involves **obvious financial risk** to you that you should **weigh carefully before proceeding**; it also may **require notice to/approval** by the subcontractor's bonding company, if any)

Continuation of performance

- ☐ Provide that the **subcontractor** must continue to perform in **accordance with the subcontract during the course** of any **dispute** between contractor and subcontractor.
- ☐ You may be able to **use this to prevent the subcontractor** from pulling off the job to **force your hand** on a disputed issue.

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Dispute resolution

- ☐ **Litigation** is usually the most expensive, time-consuming, and distracting method for settling disputes.
- ☐ Consider including an Alternative Dispute Resolution (ADR) clause in the subcontract, by which various non-court avenues must be exhausted before either party may use the courts for settlement.

Both AIA and AGC subcontract forms include ADR provisions.

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Termination of subcontract

- ☐ **Contract termination** can have **extremely serious consequences** and should be done in **consultation** with your **attorney**.

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مدیریت کسب و کار در صنعت ساخت (Construction Business Management)

ماژول ۲: مدیریت کسب و کار

بخش سوم: مدیریت منابع انسانی

ارائه دهنده:

سید محمدرضا علوی پور

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CMAA Authorized Trainer

دانشگاه Illinois Tech آمریکا

What we will learn?

- ☐ Human Resources
- ☐ The Challenge
- ☐ Decision-Making Processes
- ☐ Company Culture
- ☐ Organizational Design
- ☐ The Key Role of the Human Resources Manager in Construction Companies
- ☐ Who Are the Right People?
- ☐ Staffing
- ☐ Employment manual
- ☐ Managing Employees For the Long Term
- ☐ Employee Development

What we will learn?

- ☐ Self-Actualization Motivates More Than Money
- ☐ Knowing Yourself Well Is Critical to Management and Leadership
- ☐ Personality Assessment
- ☐ Leadership Development
- ☐ Leadership/Management Assessment
- ☐ Teaching and Mentoring: Investment with Hard-Core Results
- ☐ Leader-Manager: New Definition of Leadership in Construction Contracting
- ☐ Performance Management
- ☐ Compensation and Employee benefits
- ☐ Employee Retention
- ☐ Employee Termination
- ☐ Professional Employer Organizations

Human Resources

❑ **Managing people** is complicated because **people** are more complex than any machine.

- ❖ They defy many preconceived notions regardless of gender, nationality, beliefs system, ethnicity, or other characteristics.
- ❖ Unlike Swiss watches, and regardless of their origins, when you look inside people, I guarantee you will always be surprised by at least one thing, probably many.
 - ✓ Consequently, we are wise to understand people from many different angles.

- ☐ We don't all manage in the same way.
- ☐ Some of us lead from the front and others stay in the background.
- ☐ There is no precise prescription to managing effectively.

In this section, we will share those ideas that many construction consultants have found work well for many.

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- ❑ The complex process of managing people **starts with a simple assumption:**

To lead and manage others well, you must first know yourself well.

- ❖ If you have **great personal insight**, you will use your strengths and involve others where you are weak.
- ❖ You will know where you can **help** or **hurt the organization** and its people.
- ❑ Wise leaders and managers **don't fake anything** because they know **that's not in the long-term best interest** of their company.

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- ☐ After you gain these personal strengths, **then** you must **invest in learning** more about **others**.

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The Challenge

The challenge

❑ There are **two major challenges** relating to human resources management that company leaders face.

1. The first is to attract employees, develop them, and retain them.

✓ This is primarily a function of **how employees are treated** within the company.

✓ Meeting this challenge is becoming **more difficult** as current employees **retire**, and **talented replacements are hard** to find.

2. The second challenge is to ensure that company human resources management **policies** and **procedures** conform to **legal requirements**.

Suggested strategies to meet both of these challenges are addressed in this section.

Suggested strategies

- ❑ The **chief executive officer** or **owner** of a construction company is the **focal point** that **everyone** within the company looks to for direction, for leadership, for values, for recognition, and for assurance that everyone within the company is moving in the **correct direction**.
- ❑ **Company leaders**, knowingly or not, form their companies in their **own image**.
- ❑ They **set the standards** for company ethics and values.
- ❑ These leaders must understand that the **success** of their companies **lies in their abilities** to meet the needs and expectations of both their employees and their customers.
- ❑ **Company leaders** need to **listen** to their firms' employees and customers and **then formulate** goals, methods, and directions for their companies.

Suggested strategies

❑ The **effectiveness** of the company **leadership** can be measured in the following three ways:

1. The company's business results
2. Its organizational structure
3. Its culture

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Suggested strategies

❑ Company leaders affect the business results **not only through changes** in the organizational structure,

but **also in the work culture** that they create.

❖ They establish the **company culture** by

- ✓ Identifying and communicating core values,
- ✓ Specifying expected employee behaviors,
- ✓ Establishing methods for providing performance feedback to employees, and
- ✓ Creating supporting recognition and reward systems.

Suggested strategies

- ❑ The **quality of job performance** is influenced by
 - ❖ An employee's understanding of the importance of the job,
 - ❖ The employee's perception of how he or she is valued within the company,
 - ❖ The employee's compensation,
 - ❖ Whether or not he or she is publicly recognized for the quality of work performed, and
 - ❖ The working environment.

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Suggested strategies

❑ **Absenteeism** is generally a function of an **employee's**

- ❖ Dissatisfaction with the work environment,
- ❖ Dissatisfaction with the job responsibilities, or
- ❖ Lack of recognition.

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Suggested strategies

- ❑ Turnover is influenced by the same factors as absenteeism as well as
 - ❖ Compensation,
 - ❖ The availability of opportunities for development and advancement, and
 - ❖ The perceived opportunities at another firm.

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Suggested strategies

❑ **Construction companies** are composed of **unique individuals**

who possess different personalities and attitudes that can affect their behavior at work.

❖ **Company leaders** need to determine **which positions best fit** each current and prospective employee's **personality**.

❑ Individuals whose personalities are **not compatible** with the **job requirements** of a position might **not be successful** in that position.

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Suggested strategies

- ❑ The last aspect of organizational behavior to be considered is **how people behave** within an organization.
 - ❖ Construction companies function **best** when members **work together** as **teams** to **accomplish** collective tasks.
 - ❖ These may be **formal teams**, or they may be **informal teams**.
 - ❖ The **strength** of the company comes from the **synergy** of **employees** working together to accomplish **collective goals** and **objectives**.
 - ❖ Understanding **how to motivate** people to work together is a **major challenge** for company leaders.

Decision-Making Processes

Decision-Making processes

❑ While a **company's leadership** is a **significant** shaper of the contributions of the company's employees,

the **role** that **management decisions** play in increasing or decreasing employee **motivation** often goes **unrealized**.

❖ Adopting a strategic planning process and a decentralized decision-making approach

generally **encourages employees** to invest their time and effort in cultivating new business by strengthening **existing customer relationships**.

Decision-Making processes

❑ **While** compensation is increasingly cited as a much lower factor in overall employee satisfaction than is generally thought,

management decisions regarding compensation strategies can be a **significant issue** if handled in a way that is perceived as **unfair**.

❖ **Significant horizontal pay differences** contrive a perception of inequitable pay—inducing

1. Job dissatisfaction,
2. Low effort, and
3. Turnover.

Decision-Making processes

- ❑ Managers **directly influence these perceptions** by their ability to **recognize all members** of the team—
 - ❖ Those with more complex and highly compensated jobs
 - ❖ As well as those whose **responsibilities** are more straightforward—as important to the success of the company.
- ❑ For **all employees** to feel **valued** and **worthwhile**, there must be a **pervasive attitude** that everyone's work is important.
 - ❖ This attitude **starts** at the **top** and is reinforced **daily** by **frontline supervisors**.

Company Culture

Company culture

- ❑ While every company has its **own unique culture**,
most companies do **not consciously** try to create a certain culture.
- ❖ Typically, the culture of the organization is **created unconsciously**, based on the values and actions of the **company leaders**.
 - ✓ **Company leaders' role** in establishing ethical standards for their employees was discussed in Professional Construction Management Course.

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- ❑ The obligation to be **accountable** and **responsible** is enhanced within a **culture that supports** individual and collective empowerment.
- ❑ The conditions that help to create a **culture of empowerment** include
 - ❖ The authority to act
 - ❖ Adequate resources to act
 - ❖ An environment of trust
 - ❖ An acceptance of the obligation to be both accountable and responsible

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☐ To the extent that **these conditions exist**,

employees will feel empowered to act **individually** and **collectively**.

❖ Individual managers then become **personally** accountable and responsible to their **supervisors** or **team leaders** for

1. Their own actions and
2. All aspects of their subordinates' activities.

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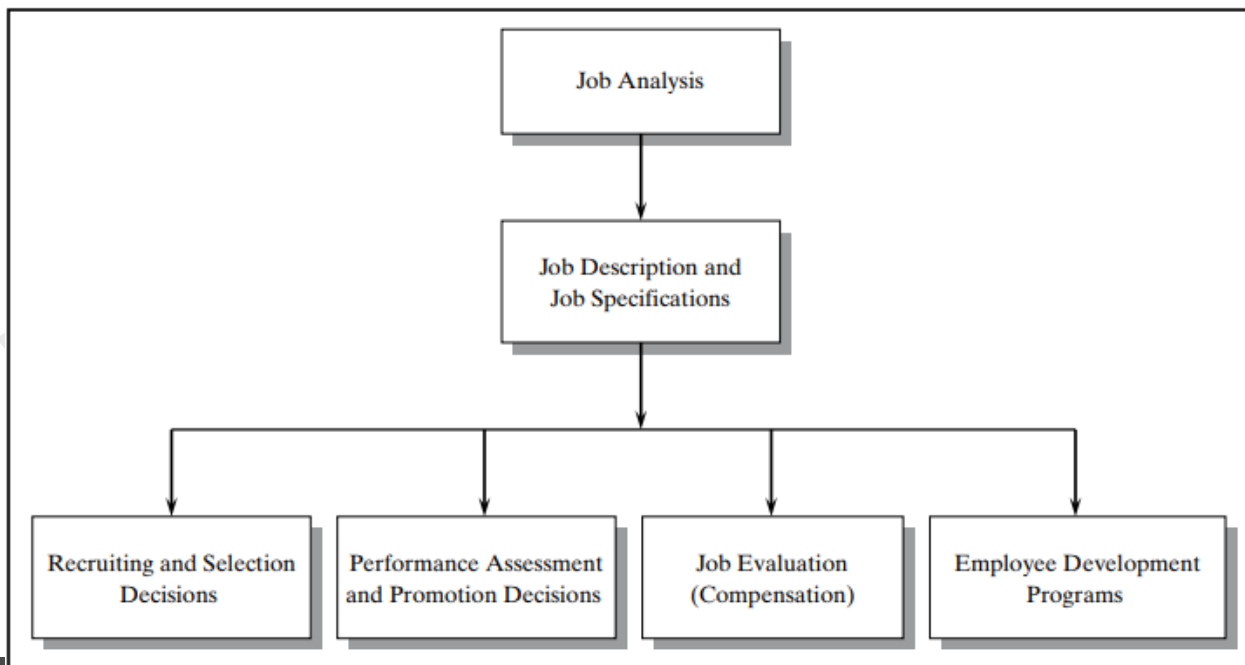
Company culture

- ❑ The **company culture** significantly influences the **company's reputation** as a **desirable place** to work.
 - ❖ How people are **valued** and **treated** will affect whether or not they wish to be **long-term employees**.
- ❑ **Most construction projects** are accomplished by **decentralized teams** working **together** to meet customer expectations.
 - ❖ Creating a **collaborative team atmosphere** is essential.
- ❑ Decision making should be **decentralized** to **empower employees** to
 - ❖ Recognize project execution issues and
 - ❖ Take action to resolve them.

Organizational Design

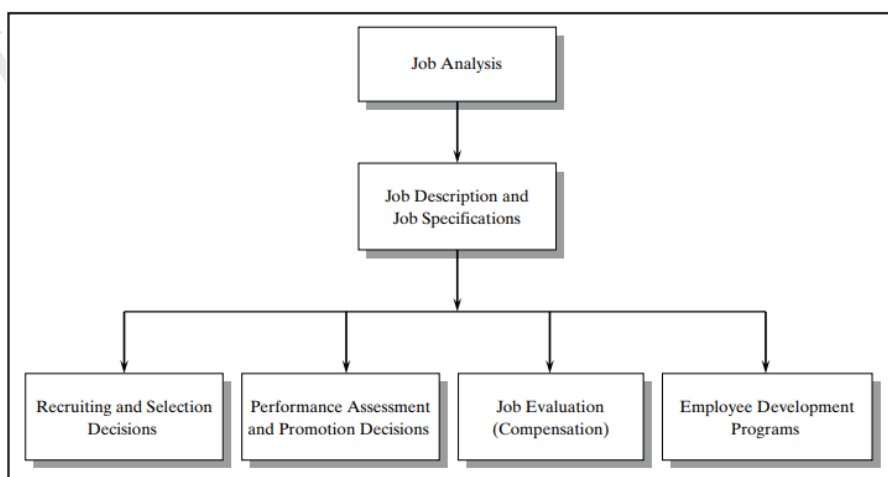
- ❑ Once the **organization chart** for the company has been **developed**,
a **job analysis** is conducted for **each position**.
- ❑ **Job analysis** is gathering information about **each job** and is the **primary building block** for most human resources management systems, as illustrated in Figure.

FIGURE 7.1 Uses of Job Analysis Information



- ❑ The major tasks, duties, and activities to be performed by the person occupying each position are identified.
- ❑ The **task inventory** includes determining
 - ❖ The information input,
 - ❖ The mental and/or physical processes to be performed,
 - ❖ The work environment,
 - ❖ The relationships to other jobs, and
 - ❖ The characteristics of the work output.

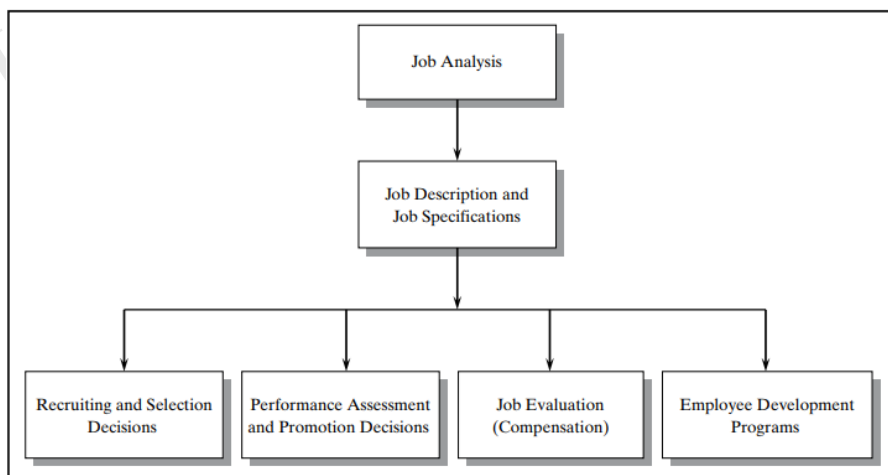
FIGURE 7.1 Uses of Job Analysis Information



❑ The **output of job analysis** is

1. A job description and
 2. A set of job specifications
- for each position.

FIGURE 7.1 Uses of Job Analysis Information



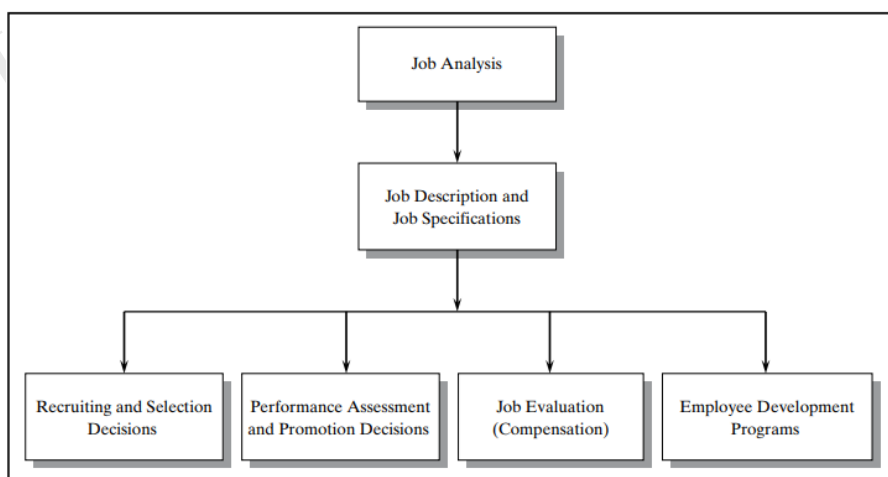
❑ The job description

defines the **major tasks** and **duties** to be performed by the **person selected** for the position.

❑ The job specifications

identify the knowledge, the abilities, and the skills needed to be able to perform the tasks and duties **contained in the job description**.

FIGURE 7.1 Uses of Job Analysis Information



- ❑ An example of a job description and a set of job specifications for an administrative assistant is shown in Figure 7.2.

FIGURE 7.2 Job Description and Job Specifications for an Administrative Assistant

Job Title: Administrative Assistant

Reports to: Project Manager

General Responsibilities: Provides clerical and reception services for project field office. Assists project personnel in the preparation and processing of written, verbal, and electronic communications. Responsible for the operation and maintenance of project office equipment.

Specific Responsibilities:

1. Provides reception services for the project office. Receives, records, and directs site visitors, telephone communications, electronic mail, internal distribution, parcel deliveries, and postal mail.
2. Assists the project manager in maintaining project files. Copies project documents as required by the project manager and company operating procedures.
3. Provides data processing support to the project office. Inputs data as required into computer database management, spreadsheet, and other applications programs.
4. Prepares final copies of letters, memorandums, typed standard forms, and other written communications, using conventional typewriters and word processing programs.
5. Prepares time sheets for hourly employees.
6. Coordinates maintenance of field office and office equipment to maintain a presentable, efficient, and functional environment. Ensures that all critical office equipment are operational at all times. Responsible for maintaining an operational stock of consumable office supplies.

Organizational design

Required Knowledge, Skills, and Abilities:

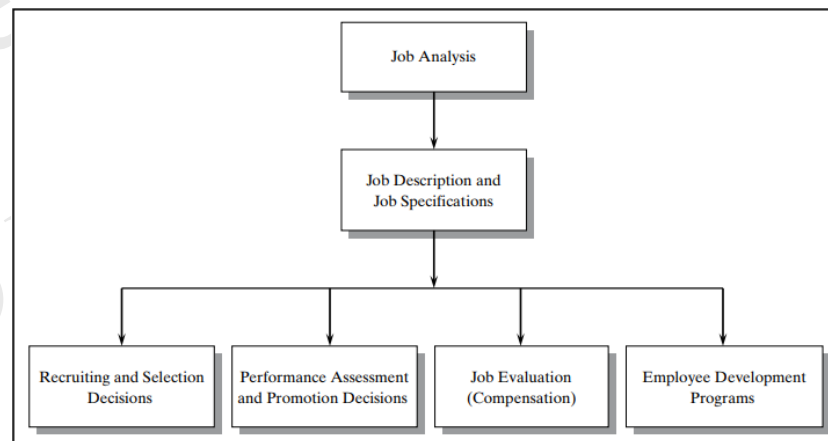
1. Knowledge of construction terms and construction documents.
2. Knowledge of the operation and user-level maintenance of standard office equipment.
3. Knowledge of computer database management, word processing, and spreadsheet software applications.
4. Skilled in keyboard operations for fast and accurate typing and data input.
5. Able to communicate effectively in person and over the telephone. Able to maintain a focus on customer service and to represent the company at the project in a professional, courteous manner.
6. Able to organize, plan, and prioritize work efficiently. Must be able to work independently and productively with limited resources.

Experience Requirements: This position requires a minimum of five years' experience in office administrative support functions, with a minimum of two years' experience in construction field offices.

❑ The **information developed** through the job analysis is used in

1. Recruiting and selecting new employees,
2. Managing employee performance and Promoting current employees,
3. Setting compensation levels, and
4. Structuring employee development programs.

FIGURE 7.1 Uses of Job Analysis Information



Responsibility vs job description

❑ While a **thorough job description** helps a new hire become familiar with his duties and responsibilities quickly, **it is only a guide.**

❖ **Consider a brain surgeon**, who **studies** a patient's MRIs and other diagnostics prior to surgery in the course of planning what he must do in the operating room to remove an invasive tumor.

❖ **Later on, during surgery**, the doctor's responsibility is **not to blindly follow** the plan he made from all the data he had at that time, but to **recognize and work** around the actual conditions he runs into in order to best deal with the tumor.

✓ Similarly, your employees must focus **not** on job **descriptions** but on **outcomes**.

Responsibility vs job description

- ❑ Your **bookkeeper's job description** may specify a list of procedures to follow in the course of providing **job cost reports**, and
by **following those procedures** the bookkeeper may **satisfy the job description** requirement.
- ❖ But **unless he “owns” the data** in the resulting reports he has **not taken responsibility** for outcomes.
 - ✓ When you're mulling over your **P&L statement** for the current month, you **don't want to hear** your bookkeeper say he followed all the **rules in generating the report**;
you want **him to confidently** tell you it is **accurate**. Period.

Responsibility vs job description

❑ Rules and job descriptions are no substitute for human initiative.

❖ Clerks follow rules.

❖ People who are given responsibility and authority are **accountable** for **outcomes**.

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Responsibility vs job description

❑ The **concept** of exercising **authority** is similar.

❖ Be sure your job superintendents, project managers, and other supervisory employees internalize and effectively exercise the **authority** they're given.

✓ For example, in dealing with a **headstrong subcontractor**,

your project manager may resort to **using you as a crutch**:

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Responsibility vs job description

❑ “Joe, my boss needs you to get this problem fixed by Thursday,”

which makes the project manager **look weak**.

❖ It **may result in Joe complying**, but your project manager just gave up his authority to effectively manage Joe, **especially when Joe is faced with a tough requirement**, in which case he will demand to **meet with you for a final decision**.

✓ **Your project manager** executes the authority you have given him by stating his instructions to Joe as his own—**not the boss's**:

“Joe, here’s how I want you to do this.”

❖ *If the subcontractor does come to you and gets nowhere, you have reinforced your employee, and Joe no longer has any illusion about who owns the authority to direct him.*

The Key Role of the Human Resources Manager in Construction Companies

موسسه مهندسی و مدیریت ساخت علوی پور (ACEMI)

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