



استراتژی مدیریت قرارداد

فصل دوم: پیکره دانش مدیریت قرارداد (Contract Management Body of Knowledge)

بخش هفتم: فاز Award از چرخه حیات مدیریت قرارداد

ارائه دهنده:

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What we will learn?

☐ Award

- ❖ Price or cost analysis
- ❖ Plan negotiations
- ❖ Select source
- ❖ Manage disagreements

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The CMBOK structure

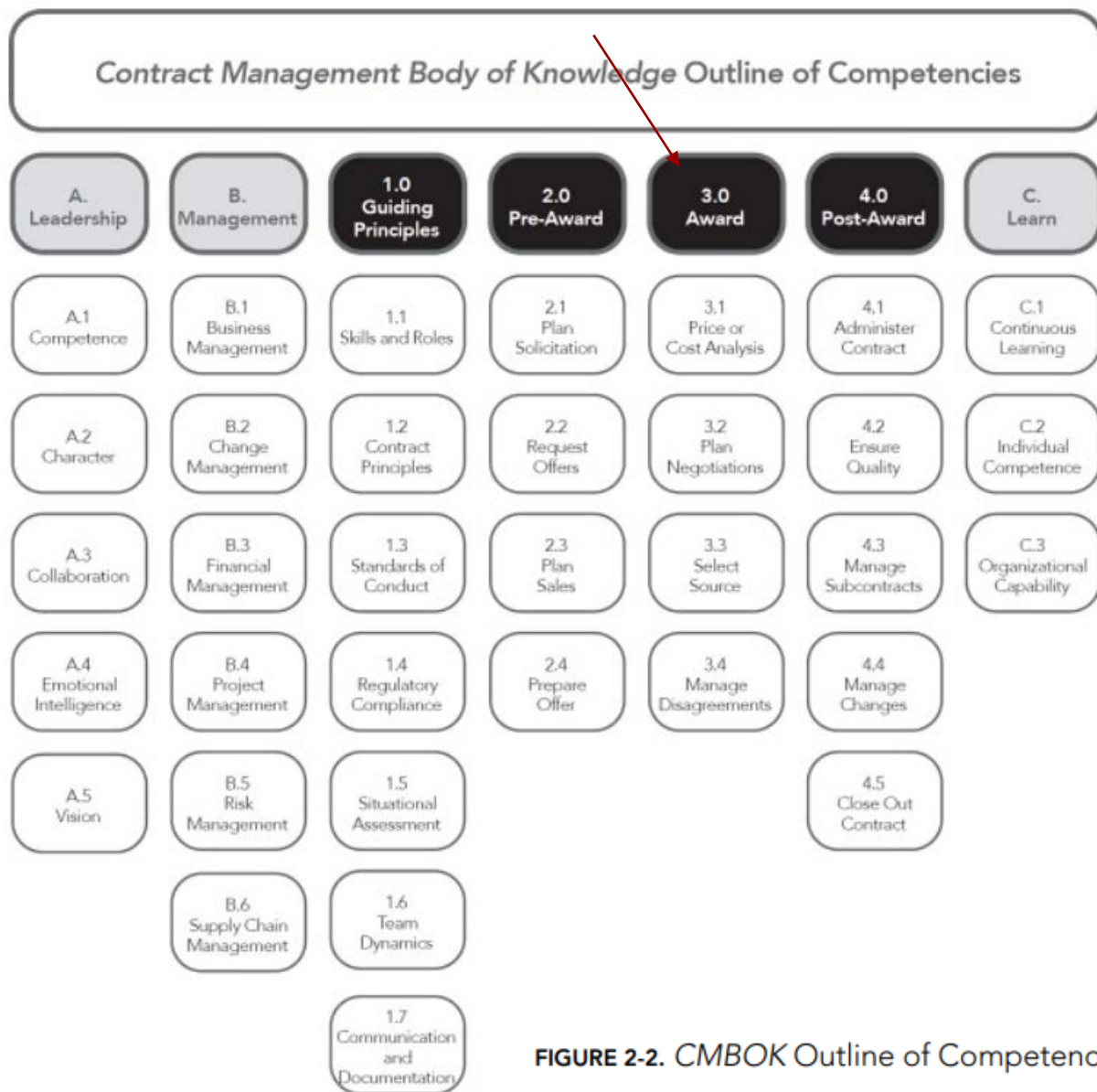


FIGURE 2-2. CMBOK Outline of Competencies

Select source

- ❑ This section describes the following contracting procedures/methods and topics related to source selection and contract award:

1. Simplified acquisition
2. Sealed bidding
3. Negotiated source selection
4. Typical evaluation factors
5. Proposal evaluation techniques
6. Evaluation rating scales
7. Negotiation guidelines
8. The negotiations
9. Contract award

Evaluation rating scales

☐ Rating scales usually take **one of several forms**.

1. Numeric scales
2. Color scales
3. Adjectival scales
4. Compare results and reach consensus

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Evaluation rating scales – Numeric scales

- ❑ Using numeric rating scales, evaluators assign a **range of points (0–10, 0–25, 0–100, etc.)** to each evaluation factor,
 - with the **highest possible rating** equaling the sum of the maximum points available for each factor.
- ❑ Numeric scales most easily accommodate **weighted evaluation factors**.
 - ❖ For example, if **technical approach** is twice as important as past performance, a maximum of **20 total points** can be allocated to technical approach and **10 points** to past performance.

Evaluation rating scales – color scales

- ☐ Many contract managers, most notably in the Department of Defense, use a **color-based scale** to evaluate proposals.
- ☐ Color scales are normally constructed with three, four, or five ranges.

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Evaluation rating scales – color scales

❑ A **three-range scale** might consist of

1. Red for “unsatisfactory,”
2. green for “satisfactory,”
3. Blue for “excellent.”
4. For four-Five-range scales,

more colors and corresponding scoring ranges are added.

❑ The **definition** for each color rating must be provided in the source selection plan and instructions to offerors and evaluators.

Evaluation rating scales – Adjectival scales

- ☐ Adjectival scales are **similar** to color scales,
but they use **adjectives** indicating the value assigned.
- ☐ As with color scales, adjectival scales usually have **three, four, or five ranges** and descriptions that may include
 1. “Unacceptable,”
 2. “Marginal,”
 3. “Acceptable,”
 4. “Good,” and
 5. “Outstanding.”
- ☐ In addition, the **definition for each rating** must be provided in the source selection plan and instructions to offerors in the solicitation.

Evaluation rating scales – Adjectival scales

FIGURE 7-8. Sample Adjectival Evaluation Rating System

Adjectival Evaluation Rating System	
Outstanding	A proposal that satisfies all of the government's requirements, with extensive detail indicating the feasibility of the approach and a thorough understanding of the problems. The proposal has numerous significant strengths that are not offset by weaknesses. The proposal has an <u>overall low degree of risk</u> .
Good	A proposal that satisfies all of the government's requirements, with <u>adequate detail</u> indicating a feasible approach and an <u>understanding</u> of the problems. The proposal has some <u>significant strengths</u> or numerous minor strengths that are not offset by weaknesses. The proposal has an <u>overall low to moderate degree of risk</u> .
Acceptable	A proposal that satisfies all of the government's requirements, with minimal detail indicating a feasible approach and a minimal understanding of the problems. The proposal has an overall moderate to high degree of risk.
Marginal	A proposal that satisfies all of the government's requirements, with minimal detail indicating a feasible approach and a minimal understanding of the problem. The proposal has an overall high degree of risk.
Unacceptable	A proposal that contains at least <u>one major error</u> , omission, or deficiency that indicates a lack of understanding of the problems. The approach cannot be expected to meet requirements or involves a very high risk. None of these conditions can be corrected without a major rewrite or proposal revision.

Evaluation rating scales – Compare results and reach consensus

- ☐ After each member of the evaluation team has **completed their individual ratings**, the **team** should come together and compare results.
- ☐ This process may **reveal** significant differences in perceptions among team members concerning the **relative quality of the proposals**.
- ☐ These differences should be viewed as positive because they will require a spirited and collaborative deliberation process to **arrive at a scoring consensus**.
- ☐ The resulting consensus should be documented thoroughly, with the **strengths** and **weaknesses** of each proposal explained.

Evaluation rating scales – Compare results and reach consensus

- ❑ If **evaluators** determine that a **score greater than “acceptable”** is to be assigned to a factor or sub-factor,

they must be sure that the **strength(s) driving that score** is **inherent or specified** in the offeror’s proposed product, service, or approach that will be specified in the resulting contract.

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Negotiation guidelines

- ☐ **Negotiators** ask questions of the other party to obtain a common understanding and **validate facts**.
- ☐ The buyer initiates the process of validating assumptions, also known as **“fact-finding.”**
- ☐ Fact-finding can be done through
 1. Telephone calls,
 2. Written correspondence, and/or
 3. In-person meetings.
- ☐ It can take place
 1. **Before** the formal negotiation session or
 2. At the **very beginning** of the session

Negotiation guidelines

- ☐ The **basic format** of negotiations is question-and-answer.
- ☐ The buyer might begin by **asking the seller** to justify a proposed price or term, and the seller **responds** by describing its justification.
- ☐ Alternatively, the seller may ask the buyer about an item in the **statement of work (SOW)**, and the buyer responds by **explaining how that item fits** into the program.
- ☐ Each agreement made during the negotiation process should be documented so that **everyone on both sides** knows that discussion on that item is considered closed.

Negotiation guidelines

- ☐ Multiple concessions bring the parties closer to **final agreement**.
- ☐ Not only does one party have to present the basis for why it is **reasonable**;
that **party must** also convince the other party that it is in **their best interest to accept it**.
- ☐ In this process of give-and-take, both parties must remain **open to challenging** their own team's positions as new information is received.

Select source

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The negotiations

□ Although the price and contract negotiation documentation may have different **formats or styles**, the following list identifies some **basic information that documentation** should include:

- A description of the goods or services to be purchased, quantities, and delivery schedule;
- The solicitation/proposal number;
- The parties involved, including complete names, addresses, and phone numbers;
- The acquisition history, including the date the offer was received and outside inputs or analyses (e.g., audit or technical evaluations);
- The negotiation objectives and their justifications; and

The negotiations

❑ Although the price and contract negotiation documentation may have different **formats or styles**, the following list identifies some **basic information that documentation** should include:

- A negotiation summary, including:
 - Concessions made and their impact on negotiation objectives,
 - Major items discussed and the parties' positions and outcomes,
 - Use of and reliance on data submitted (including but not limited to price and cost), and
 - A signed copy of the agreed-to final position.

Select source

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Awarding the contract

1. Preparing the contract
- 2. Best practices to avoid post-award disagreements**
 - i. Selecting and defining key words and terms
 - ii. Tailoring terms and conditions to the situation
 - iii. Reviews before execution
 - iv. Post-award review
3. Notification

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Awarding the contract - Best practices to avoid post-award disagreements

- ☐ Well-written contracts that are easily understood, effectively managed, and successfully executed do not occur by accident.
- ☐ The **following best practices** can be applied to government and commercial contracts to **mitigate contract interpretation issues**.

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Awarding the contract - Best practices to avoid post-award disagreements

❑ Selecting and Defining Key Words and Terms

- ❖ It is critical to carefully select the most appropriate words and terms in contracts because different words and phrases **have various meanings**.
- ❖ In addition, including the **definitions of key words and terms** in the contract has been shown to be effective.
- ❖ Some organizations have created a specific contract glossary of key words and terms with their appropriate definitions.

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Awarding the contract - Best practices to avoid post-award disagreements

❑ Tailoring Terms and Conditions to the Situation

- ❖ In contracting, the **terms and conditions** can be overwhelming.
- ❖ Most government contracts for noncommercial item acquisitions exceeding the simplified acquisition threshold contain **dozens of clauses** that are incorporated by reference.
- ❖ There are **times when these clauses** are not applicable to the contract situation

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Awarding the contract - Best practices to avoid post-award disagreements

❑ Tailoring Terms and Conditions to the Situation

❖ **Sellers** should read the solicitation provisions to

1. Seek clarification or
2. Negotiate appropriate terms and conditions.

❖ Likewise, **after the contract is awarded**,

subsequent modifications may contain terms and conditions
that can be negotiated.

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Awarding the contract - Best practices to avoid post-award disagreements

❑ Reviews Before Execution

- ❖ Due to **situations and metrics** that encourage or demand speed, accuracy is sometimes **sacrificed**.
- ❖ An **inaccurate solicitation** can lead to an inaccurate proposal, which can result in a **failed contract**.
- ❖ Contract management organizations should conduct reviews to increase the **accuracy** of solicitations, proposals, and contracts.
- ❖ **Review boards** should **consist of experts in relevant areas** to
 1. Ensure that the solicitation, proposal, or contract makes sense and
 2. Identify and correct any unclear, vague, inaccurate, or contradictory language.

Awarding the contract - Best practices to avoid post-award disagreements

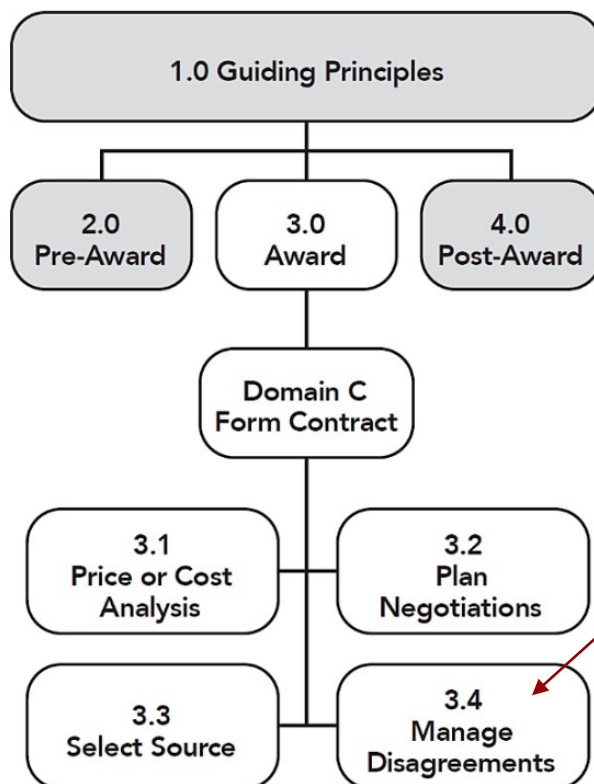
❑ Post-Award Review

- ❖ Despite the best reviews, there will likely be **some type of disagreement** once the contract is awarded.
- ❖ Conducting a post-award discussion, **before work starts**, with both the buyer and seller present is extremely helpful in establishing communication channels and business processes.
- ❖ This meeting can also
 1. Establish the rules for how to hold each party accountable for the performance of the work and
 2. Agree to methods to quickly and promptly resolve any contract interpretation issues.

DOMAIN C: FORM CONTRACT

(MANAGE DISAGREEMENTS)

Manage disagreements



Manage disagreements

Manage Disagreements is the process of resolving conflict between potential and actual contracted parties in order to maintain legal conformity. This process involves the ability to resolve issues related to the solicitation or source selection process through informal and formal means.

Manage disagreements

☐ Protests

1. Pre-award protest issues
2. Post-award protest issues

A-23. APPEAL OF DETERMINATION OF NONRESPONSIBILITY

A-24. PROTEST OF AWARD OR DECISION TO AWARD

Manage disagreements – Protests

- ❑ This section will **not deal** with the detailed and rigorous processes and venues used to **resolve protests**; instead, it will **briefly discuss** some of the more common reasons for protests.

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Manage disagreements – Protests: Pre-award protest issues

- ☐ **Restrictive requirements**—A protestor may claim that the **requirements or specifications** are **unnecessarily restrictive** and thereby **prohibit or limit** meaningful competition.

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Manage disagreements – Protests: Pre-award protest issues

- ☐ **Inappropriate sole-source requirement**—A protestor may claim that a requirement **advertised** as a sole-source procurement is **not, in fact, a valid use** of sole-source authority and that the possibility for **competition exists**.

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Manage disagreements – Protests: Pre-award protest issues

- ❑ **Ambiguous or erroneous evaluation criteria**—A protestor may claim that the criteria stated to be used to **evaluate proposals** is flawed, inaccurate, or ambiguous in some material way that will **negatively impact** the protestor's ability to fairly compete.

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Manage disagreements – Protests: Pre-award protest issues

- ❑ **Ambiguous or incomplete requirements**—A protestor may claim that the statement of work is **so incomplete or ambiguous** that it **precludes** a clear understanding of the full nature and scope of the requirement to be performed.

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Manage disagreements – Protests: Pre-award protest issues

- ❑ **Exclusion from the competitive range**—A protestor may claim that
 1. Their **exclusion** from the **competitive range** was inappropriate or
 2. The agency did not clearly identify in the solicitation the **criteria** it would use to establish a competitive range.

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Manage disagreements – Protests: Pre-award protest issues

- ☐ **Unfair evaluation criteria**—A protestor may assert that
one or more of the criteria used to evaluate proposals was
unreasonable, unfair, or otherwise inappropriate.

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Manage disagreements – Protests: Post-award protest issues

☐ Failure to evaluate in accordance with the solicitation's provisions —A protestor

may claim that

the **method** used to evaluate proposals was **significantly different** from the **evaluation criteria** specified in the solicitation.

☐ This may include a belief that

1. The **evaluators missed a step or failed** to evaluate something the solicitation criteria specified, or
2. It may assert that **added, unspecified criteria** were **used to form a basis** for the government's decision.

A-24.

PROTEST OF AWARD OR DECISION TO AWARD

Manage disagreements – Protests: Post-award protest issues

- ❑ **Unreasonable best value analysis**—A protestor may indicate that, in a best value procurement, the cost/technical trade-off analysis used to justify an award to **other than** the highest-rated or lowest price proposal was flawed, inaccurate, or otherwise unreasonable in some material way.

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Manage disagreements – Protests: Post-award protest issues

- ❑ **Unequal treatment**—A protestor may claim that
other offerors received some form of special treatment or that all offerors
were not treated equally,
thereby **adversely impacting** the protestor's ability to compete
effectively.

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Manage disagreements – Protests: Post-award protest issues

- ❑ **Failure to conduct meaningful discussions**—A protestor may claim that they were **not invited** to conduct meaningful discussions during pre-award negotiations,
unfairly preventing them from having the opportunity to submit a more competitive, revised proposal.

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پیکره دانش مدیریت قرارداد (Contract Management Body of Knowledge)

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ارائه دهنده:

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What we will learn?

☐ Award

- ❖ Administer contract
- ❖ Ensure quality
- ❖ Manage subcontracts
- ❖ Manage changes
- ❖ Close out contract

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The CMBOK structure

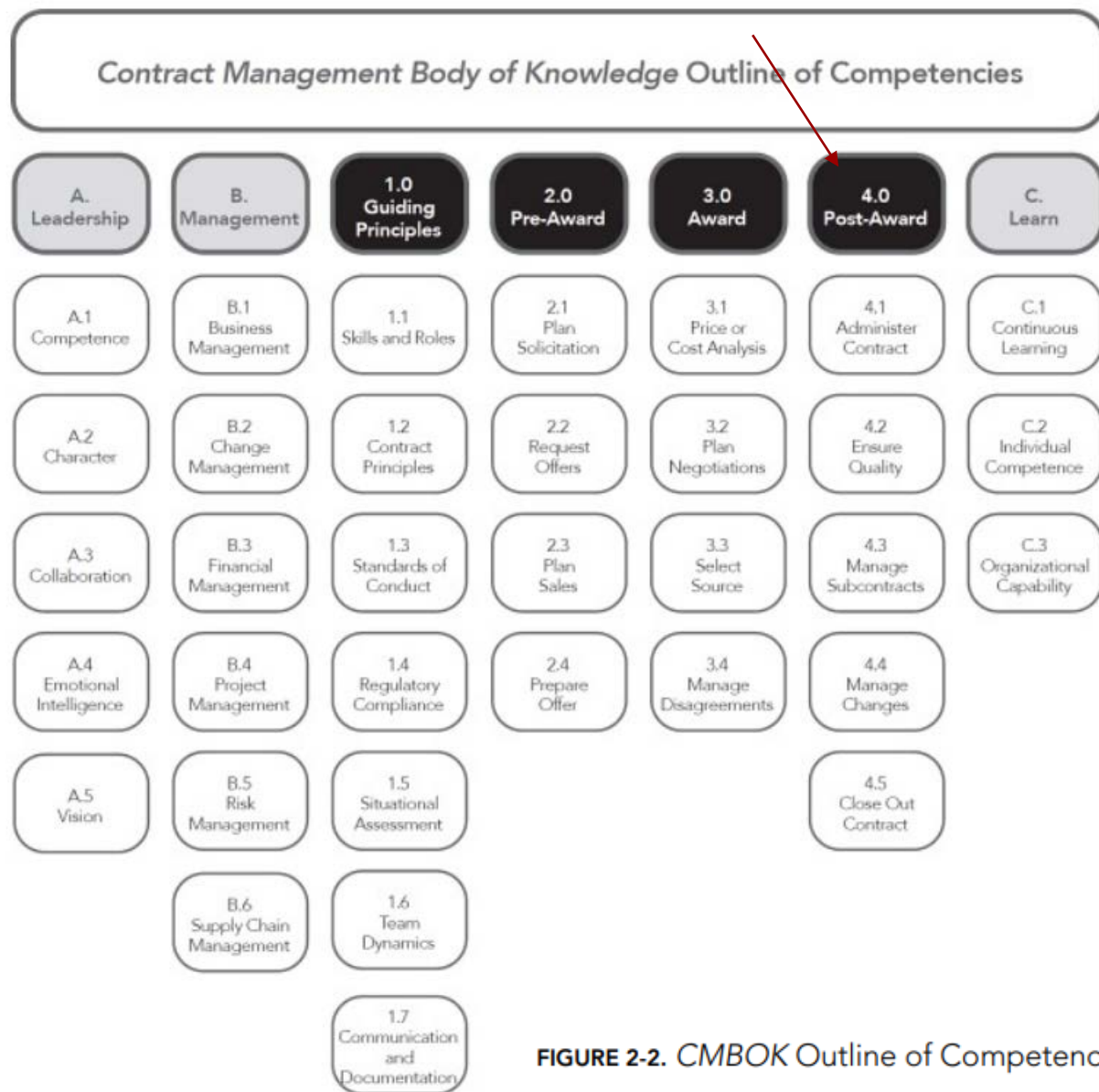
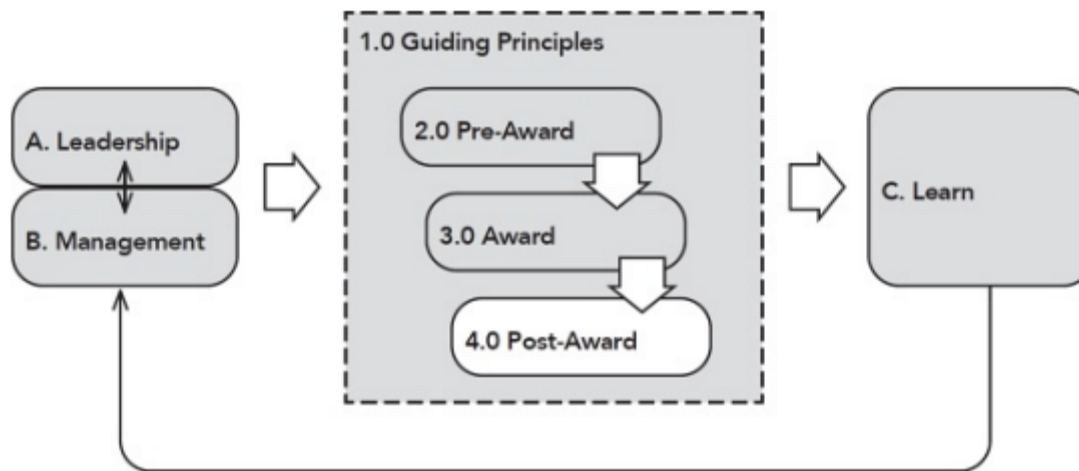


FIGURE 2-2. CMBOK Outline of Competencies

Introduction

FIGURE 8-1. The CMBOK Competency System



POST-AWARD

Introduction

Once the award phase is completed, the post-award contract life cycle phase begins. This involves the contract management functions known as “contract administration” and “contract closeout.” The contract administration functions will vary greatly depending on the complexity of the contract. Both the buyer and seller are actively involved in contract administration to ensure satisfactory performance and to bring the contract to a successful conclusion.

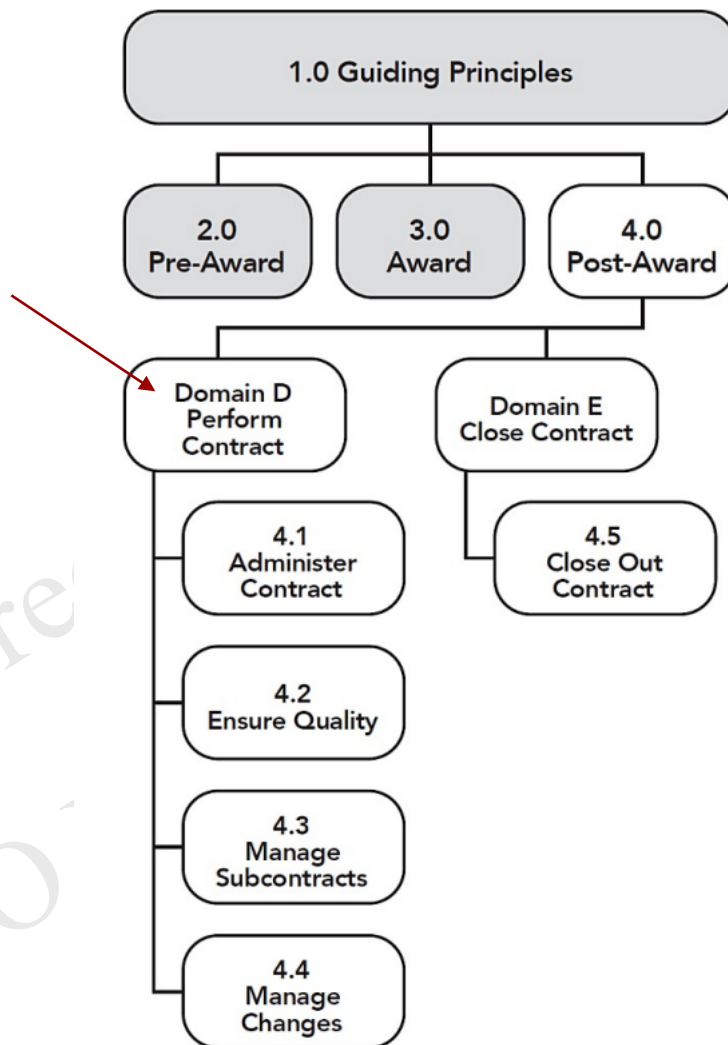
There are two domains within the post-award phase:

- *Perform Contract*—The job tasks and competencies for this domain produce the contract performance.
- *Close Contract*—The job tasks and competency for this domain produces the closed contract.

The post-award processes interact with each other, and they continuously integrate with the Guiding Principles. Post-award processes and results are directly impacted by the cumulative effect of the performance and results from the pre-award and award processes.

DOMAIN D: PERFORM CONTRACT

Introduction



Perform contract

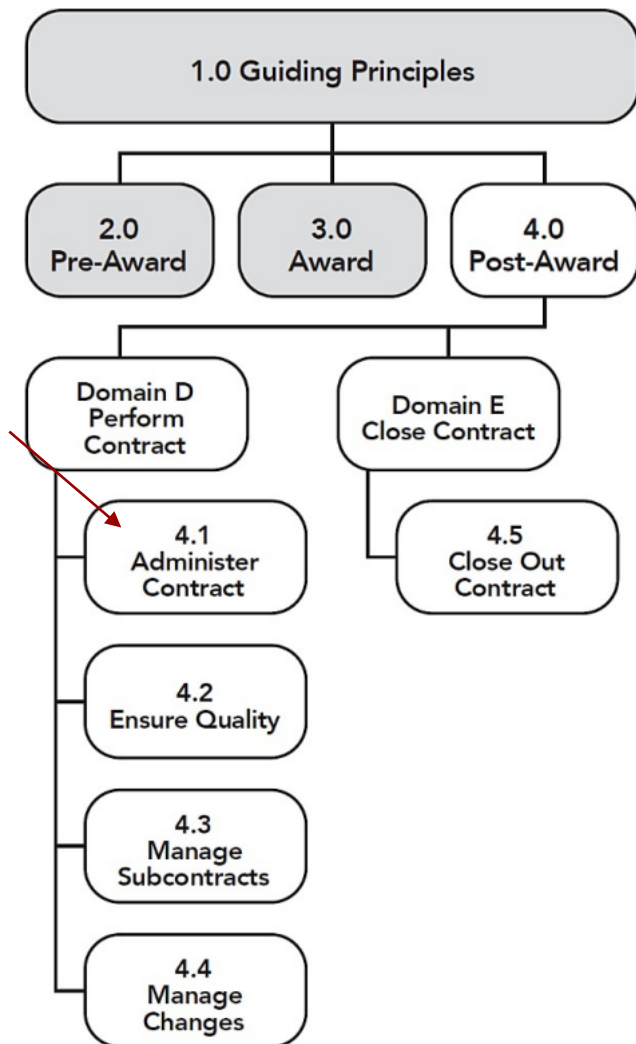
Perform Contract involves the process of executing contract requirements, managing business relationships, ensuring quality, and managing changes.

The value added by this process is in monitoring risk, assessing its impact on contract performance, and ensuring compliance with contractual terms and conditions during contract performance up to contract closeout or termination.

DOMAIN D: PERFORM CONTRACT

(ADMINISTER CONTRACT)

Perform contract



Appendix A: CM Contract Administration Checklist

Construction Phase Tasks

- | | |
|---|--|
| ✓ Pre-construction conference | ✓ Field reports |
| ✓ Contract & specification requirements | ✓ Safety |
| ✓ Construction management plan | ✓ Change management |
| ✓ Partnering | ✓ Cost control |
| ✓ Documentation of existing conditions | ✓ Schedule monitoring |
| ✓ Assignment of owner-furnished items | ✓ Progress payments |
| ✓ Permits, insurance, labor affidavits, and bonds | ✓ Status reports |
| ✓ Communication procedures | ✓ Entitlement evaluation |
| ✓ Meetings | ✓ Damages assessment |
| ✓ Documentation procedures | ✓ Record drawings |
| ✓ Computerized information management | ✓ Punchlists |
| ✓ Quality assurance/quality control | ✓ Commissioning and functional performance testing |

Administer contract

Administer Contract is the process of establishing expectations, maintaining communication channels, processing contract documentation, conducting post-award performance reviews, and assessing contract performance.

This process involves managing risk and increasing the likelihood of satisfactory contract execution.

Contract administration includes managing the project to ensure timely completion, within budget and in conformance with the contract requirements. The CM establishes systems, policies, and procedures necessary to ensure adequate project controls are in place. The CM must confirm that appropriate stakeholders are identified. It is also important to understand the basic responsibilities and interrelationships of all team members, i.e., the owner, the designer, the contractor, the CM, the consultants, and any required specialty professionals. Additionally, the CM must have the functional knowledge of the interrelationships between such management components as time, claims, cost, information, quality, risk, safety, and sustainability. **See Appendix A: CM Contract Administration Checklist.**

Depending on the details of the contract with the owner, the CM may only be involved with one phase of the project (e.g. the construction phase) or all phases based on the scope of work negotiated with the owner and the project delivery method used. The CM may need to complete numerous pre-design and/or design guidelines during the construction phase if those services are in the CM's agreement with the owner. Accordingly, the procedures in this guideline must be adapted to fit the needs of the project, the CM's scope of work, and the project delivery method selected.

Administer contract

☐ The following sections describe important elements of post-award.

1. Using effective communication

2. Attending the post-award kickoff meeting

3. Conducting status review meetings

4. Preparing written status reports

5. Observing and monitoring performance

6. Documenting performance and providing feedback to the seller

7. Resolving requests for equitable adjustment and claims

Attend post-award kickoff meeting

- ☐ It could include the development of a procedure for
 1. Continuing written and verbal communications,
 2. Along with an **overview** of the change control process.

- ☐ This **procedure** should clearly specify, for **both the buyer and seller**, the following:
 1. **Who** is authorized to represent their respective organizations in official communications,
 2. The **subject matter** appropriate for communication, and
 3. The **form** and **format** such communication should take.

Attend post-award kickoff meeting

- ❑ Because many players on both sides will **not be contracting professionals**, this agreement can **significantly reduce or eliminate** issues related to constructive changes, apparent authority, etc.

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Administer contract

☐ The following sections describe important elements of post-award.

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3. **Conducting status review meetings**

4. Preparing written status reports

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Conducting status review meetings

- ☐ Status review meetings should be specified in the contract and conducted on a **regularly scheduled basis** (monthly, quarterly, etc., or on completion of specified milestones such as delivery of a product or service).
- ☐ The contract should specify **when these status review meetings** occur in the statement of work or as a formal deliverable including the frequency, content, and required attendees.
- ☐ **Each meeting** should have a written agenda and written minutes.

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Prepare written status reports

- ☐ When specified in the contract, the seller should provide written status reports as a deliverable to keep the **buyer's organization and customers aware of progress and issues**.
- ☐ These reports can be narrative, statistical, or a **combination of the two** (consistent with contractual requirements).
- ☐ **Submitting performance status** is effective only if the buyer actually reads the reports provided.

Administer contract

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7. Resolving requests for equitable adjustment and claims

Resolving requests for equitable adjustment and claims

- ❑ (From the article, “Requests for Equitable Adjustment and Contractor Claims,” by Shaw Cohe and Gregory A. Garrett)

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Resolving requests for equitable adjustment and claims

❑ This section presents how the federal government

processes REAs and contractor claims,

however, the processes and concepts can be applied in many

nongovernment scenarios.

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Resolving requests for equitable adjustment and claims

- ☐ A contractor may make a claim when its REA has failed,
either in whole or in part.
- ☐ There is **no requirement** for a government contractor to **submit an REA**
prior to submitting its claim, but most do.

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Resolving requests for equitable adjustment and claims

- ❑ **While communicating** with contracting officers about an unsuccessful REA,
contractors may learn the **government's position** in some detail.
- ❑ This process generally narrows the factual and/or legal differences between the parties, and
for that reason, it is **usually worthwhile** for contractors to make the effort to **negotiate an REA** with a contracting officer before making a claim.

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Resolving requests for equitable adjustment and claims

1. Definitions
2. REA
3. Contract claims process
4. Contract disputes act
 - ❖ Contractor claims
 - ❖ Government claims
 - ❖ Contracting officer final decisions
 - ❖ Proving damages
 - ❖ Actual method
 - ❖ Jury verdict method

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Resolving requests for equitable adjustment and claims – Definitions

- A *claim* is a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of the contract terms, or other relief arising from or relating to the contract.
- An *equitable adjustment* is the compensation or price adjustment to which a contractor is entitled upon the occurrence of a contract change or special event.
- A *request for equitable adjustment* is a letter or proposal requesting a change to the contract price or schedule.

Resolving requests for equitable adjustment and claims – REA

- ☐ An **REA** is a proposal submitted after the contract is awarded that attempts to **negotiate a fair and reasonable settlement** between the parties without submitting a **claim**.
- ☐ A claim under a government contract must be founded on a “**Relief-Granting**” clause,
which **differs from** claims under commercial contracts.
- ☐ **Experience** has shown that the clear majority of government contract claims arise under the “**Changes**” clause.

Resolving requests for equitable adjustment and claims – REA

❑ An REA may be

1. **Developed** by a subcontractor and submitted to a higher-tier subcontractor,
2. **Developed** by a subcontractor and submitted to the prime contractor, and
3. **Developed** by the prime contractor and submitted to the government contracting officer.

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Resolving requests for equitable adjustment and claims – Contract claims process

1. The **claims process begins** with
 1. The government prime contractor **forwarding a claim** and
 2. A brief statement explaining why the contractor believes the government is liable to the contracting officer.
2. The **contracting officer** must then render a final decision on the claim.
3. If the **contracting officer's final decision** denies the claim, either in whole or in part, the contractor may **file an appeal**.
4. Under Contract Disputes, a **contractor's appeal** also has **time limits**.

Resolving requests for equitable adjustment and claims – Contract claims process

□ Appeals of a final decision may be **bifurcated**, i.e., divided into two phases.

1. The first phase is entitlement, in which the question for resolution is whether the government breached the contract.
2. Only if it is **determined that the government breached** the contract do the parties then address quantum, the second phase of a claim, and assesses how to measure the contractor's damages.

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Resolving requests for equitable adjustment and claims – Contract disputes act: Contractor claims

- ❑ A **contractor** must base its claim on a Relief-Granting clause in the contract.
- ❑ This is important because some **FAR clauses** vary the recovery a contractor may receive.
 - ❖ For example, the **Termination for Convenience clause** provides that a contractor may receive payment for the following:
 - ✓ Unpaid costs up to the date of termination,
 - ✓ Settlement costs, and
 - ✓ An allowance for profit (an undefined term).

Resolving requests for equitable adjustment and claims – Contract disputes act: Contractor claims

❑ On the other hand, the **only relief a contractor** may receive under the “**Differing**

Site Conditions” clause is that

an **equitable adjustment** shall be made to the contract, and

only if the contractor notified the government of the condition **promptly**.

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Resolving requests for equitable adjustment and claims – Contract disputes act: Contractor claims

- ❑ One problem area for contractors is with claims by subcontractors.
- ❑ Because subcontractors do **not have a contract** with the government, they do **not have a right** to file a contract claim against the government.
 - ❖ In government contract law, this is known as a **lack of privity**.

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Resolving requests for equitable adjustment and claims – Contract disputes act: Contractor claims

- ❑ For a **subcontractor to have its claim** presented to a contracting officer,
it **must first** have its **prime contractor exercise** its right to file a claim against the government, and
the **contractor must forward the claim** to the contracting officer on
behalf of the subcontractor.
- ❑ **Subcontractor claims** are sometimes called sponsored claims because the **prime contractor** essentially sponsors its subcontractor's claim.
- ❑ All the requirements applicable to a prime contractor's claim are **equally applicable** to a subcontractor's claim.

Resolving requests for equitable adjustment and claims – Contract disputes act: Government claims

- ❑ Though infrequent, the government may make an affirmative claim, which is a **claim against a contractor**.
- ❑ A **government claim**
 1. May be made directly against a contractor (in which case the government is the **plaintiff**),
 2. May arise as a counterclaim where the government is the **defendant**.
- ❖ In either event, **Contract Disputes** requires any government claim to also be **subject to a contracting officer's final decision**.

Resolving requests for equitable adjustment and claims – Contract disputes act: Contracting officer final decisions

- ☐ All claims arising under a government contract **must first** be considered by a contracting officer.
- ☐ As noted previously, a claim **may be made after** an unsuccessful REA (although the submission of an REA is not required).
- ☐ The requirements applicable to a claim are found in FAR Part 33.2.
 - ❖ <https://www.acquisition.gov/far/subpart-33.2>

Resolving requests for equitable adjustment and claims – Contract disputes act: Contracting officer final decisions

- ❑ One requirement is that claims over \$100,000 must be certified as follows:

"I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable; and that I am duly authorized to certify the claim on behalf of the contractor."

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Resolving requests for equitable adjustment and claims – Contract disputes act: Contracting officer final decisions

- ☐ **Legal interest starts** on the day the contracting officer receives the claim and continues **until the claim is paid**.
- ☐ **Unlike an REA**, estimates of costs may not be used because **Contract Disputes requires** a claim to be for a sum certain.

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Resolving requests for equitable adjustment and claims – Contract disputes act: Contracting officer final decisions

- ☐ **After** a contractor submits a claim, a contracting officer's typical first move is to have the claim audited.
- ☐ Of course, an **audit** only considers the quantum portion of a contractor's claim, **not entitlement**.

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Resolving requests for equitable adjustment and claims – Contract disputes act: Proving damages

❑ There are **two generally accepted methods** for contractors to prove their damages

(or quantum) under a government contract:

1. The actual cost method
2. The jury verdict method

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Resolving requests for equitable adjustment and claims – Contract disputes act: Proving damages

1. Actual Cost Method

- ❖ A contractor should be able to **prove its actual costs** if its accounting system can **track increased costs related** to the work.
- ❖ More specifically, the **contractor** should be **able to**
 1. Identify
 2. Separately accumulate**specific costs** incurred under a contract, particularly if the **changed work** is separately identifiable.

Resolving requests for equitable adjustment and claims – Contract disputes act: Proving damages

1. Actual Cost Method

- ❖ For many years, all off-the-shelf accounting software provided the capability to amass costs into discrete groupings,
so **inadequacies** in an **accounting system** could not be used to excuse a
contractor from **using the actual cost method**.
- ❖ Accordingly, **contractors that did not** use the actual cost method typically
alleged that the changed work could not be differentiated from the
underlying contract work.

Resolving requests for equitable adjustment and claims – Contract disputes act: Proving damages

2. Jury Verdict Method

- ❖ The jury verdict method is the name generally given to **damages calculations** arrived at by a judge based on the **available evidence** and there is **no specific method of computation**.
- ❖ The circumstances of the case are usually such that there is **considerable uncertainty** concerning the amount of the contractor's damages, although there is **no uncertainty** that the contractor has been **damaged**.

Resolving requests for equitable adjustment and claims – Contract disputes act: Proving damages

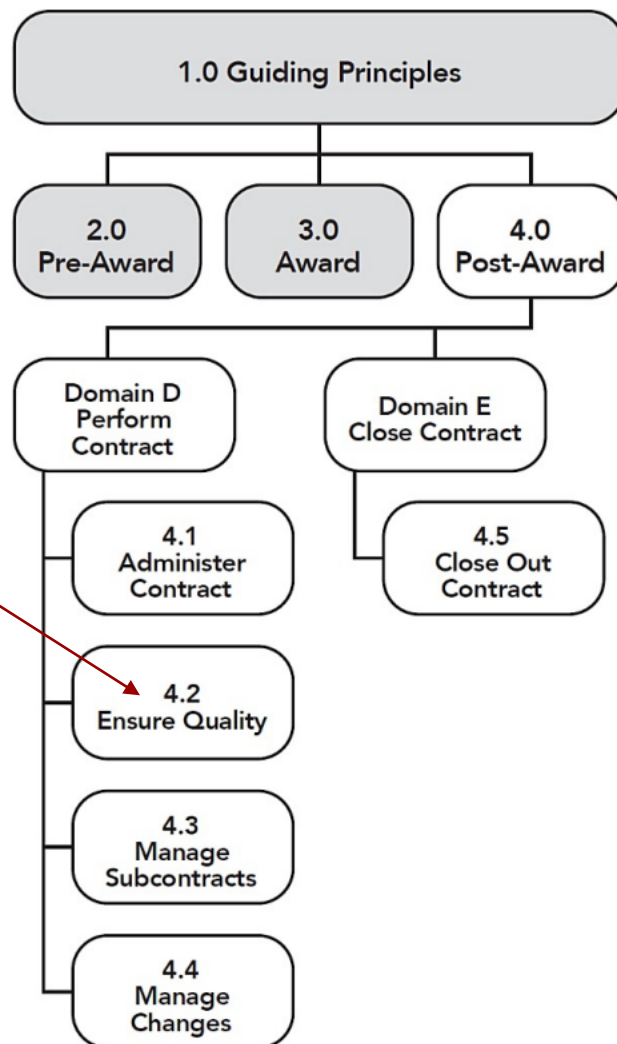
2. Jury Verdict Method

- ❖ In such cases, the **courts have concluded** that the risk of that uncertainty should **not be placed** on the injured party, and
an **approximation of the damages** is based on what the court believes a **jury verdict** would be.
- ❖ In **government contract claims**, the jury verdict method
has been **applied almost exclusively** in breach of contract cases,
which **explains why** jury verdict damages are infrequent.

DOMAIN D: PERFORM CONTRACT

(ENSURE QUALITY)

Ensure quality



Ensure quality

Ensure Quality is the process of planning for contract performance and delivery, monitoring performance, and inspecting and accepting contract deliveries.

This process involves ensuring the delivered goods or services meet the specifications, terms, and conditions of the contract.



Ensure quality

1. Quality assurance tools
2. Acceptance testing
3. Contract manager role

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Quality assurance tools

❑ Quality assurance can be objective or subjective.

1. Objective quality assurance is typically documented **mathematically**,
such as miles per hour, mean time between failure, or lines of code.
2. Subjective criteria could be stated in **vague terms in the contract**
such as best efforts, acceptable practices, or as required.

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Quality assurance tools

❑ **When establishing** quality assurance measurements, the **contract** should state the following:

1. What will be measured,
2. How the data will be collected, and
3. When the measurement will be conducted.
4. The quality assurance team should know
 - i. What the targeted goal (acceptance criteria) is and
 - ii. Who is responsible for gathering the data.



Ensure quality

1. Quality assurance tools
2. Acceptance testing
3. Contract manager role

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Acceptance testing

- ❑ The contract's inspection and acceptance requirements should be **clearly stated detailing**

1. Location,
2. Method, and
3. Manner of inspection and/or testing
4. Along with the milestone dates when this will occur

When a product meets the requirements and passes testing, a formal written acknowledgment is typically required to document acceptance.

What if product does not pass the inspection?

Acceptance testing

- ☐ The contract should also state the process and procedure for what happens if the product does **not pass the inspection**.
- ☐ Contracts may require
 1. rework,
 2. repair, or
 3. revision of defective products
- ☐ The **contract** should also clearly state
how the cost of such rework, repair, or revision should be **handled**.
- ☐ There should be a corrective action plan to ensure that
 1. **Rework** and
 2. **Re-inspection** are documented.



Ensure quality

1. Quality assurance tools
2. Acceptance testing
3. Contract manager role

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Contract manager role

❑ While buying contract managers **do not typically inspect** products and services, they **play an important role** in the quality assurance process by

1. Documenting the results of the inspection/acceptance process and
2. Ensuring that invoices are
 1. Sent and
 2. Paid

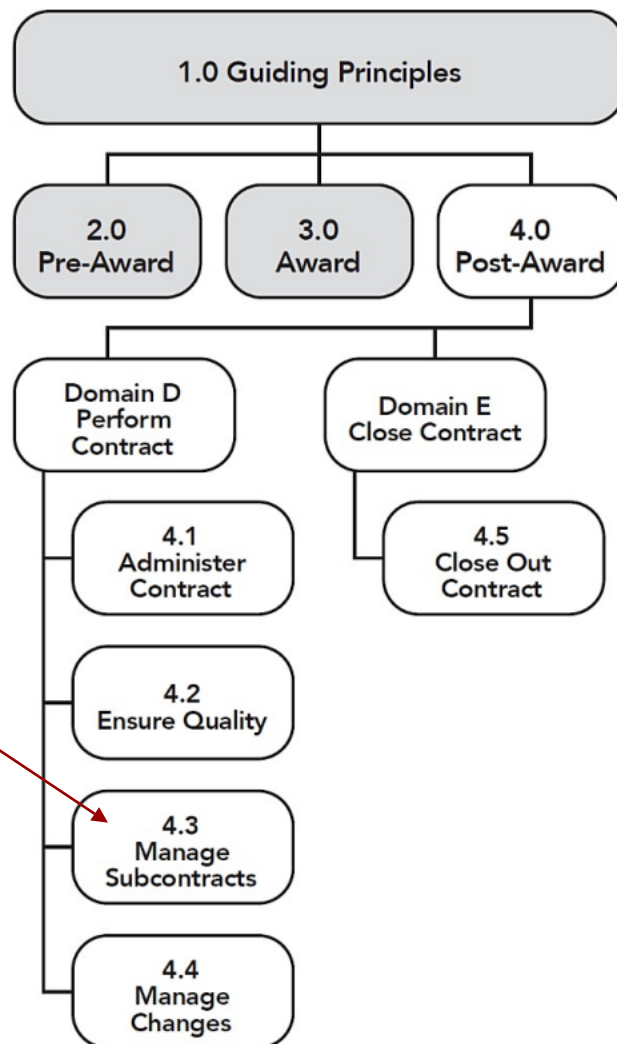
in a timely manner.

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DOMAIN D: PERFORM CONTRACT

(MANAGE SUBCONTRACTS)

Manage subcontracts



Manage subcontract

(By Jim Kirlin)

Manage Subcontracts is the process of planning, awarding, and managing subordinate contracts determined necessary to support and successfully execute the prime contract. The subcontracting process aligns to and is integrated with the pre-award, award, and postaward life cycle phases applicable to the prime contract.

Though managing subcontracts is in the postaward life cycle phase of a contract, the Guiding Principles, contract life cycle processes, and significant outcomes are applicable to subcontracts.

Manage subcontract

1. Purpose

2. Definitions

3. Subcontract management related to sourcing
4. Subcontract management related to supply chain management
5. Subcontract management related to purchasing
6. Prime contract and subcontracts
7. Subcontract management
8. Internal company organization for subcontract management
9. Hybrid nature of subcontracts under U.S. Government prime contracts
10. Teaming agreements
11. Importance of subcontract management

Purpose

❑ This section discusses

1. Essentials of subcontract management and
2. Addresses what a **contract manager** should know about subcontract management.

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Definitions

- ❑ A prime contract is the contract between the **customer and the seller** with **complete responsibility** for the work.
- ❑ Subcontract management is the contract management of subcontracts.
 - ❖ A **subcontract** is any contract in **support of a prime contract**.

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Manage subcontract

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Subcontract management related to sourcing

☐ Subcontract management both

1. Creates the link and
2. Is the link to the supplier.

☐ Further, **subcontract management** is contractually responsible for the **deliveries** from the **suppliers or subcontractors**.

- ❖ Therefore, **subcontract management** is a critical part in the supply chain.

Subcontract management related to supply chain management

- ❑ **Subcontract management** is responsible for purchasing/procurement, which is **one of many components** of supply management.
 - ❖ See Supply Chain Management for more discussion on the other components of supply management.

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Subcontract management related to purchasing – Purchasing process

□ Defining purchasing process, the **Institute for Supply Management** states, “*the series of activities involved in obtaining the necessary inputs of an organization are delineated by the following nine key steps:*

1. Determination and description of need,
2. Communication of need,
3. Identification of potential sources,
4. Solicitation and evaluation of bids and proposals,
5. Preparation of purchase order,
6. Follow up and expediting,
7. Receipt and inspection,
8. Clearing the invoice and payment, and
9. Maintenance of records (Institute for Supply Management, 2006).”

Prime contract and subcontracts

- ☐ A **prime contract** is the contract between the customer and the seller with complete responsibility for the work.
- ☐ The contractor is called the prime contractor or the prime.
- ☐ When the **prime** requires supplies, materials, equipment, or services of any kind to meet prime contract requirements,
they may be **acquired via a subcontract**, which is any contract in support of a prime contract.
- ☐ It is **common** for **some or all subcontracts** to be called purchase orders,
which are **subcontracts** from a legal perspective. (Cavinato, 2006).

Prime contract and subcontracts

FIGURE 8-3. The Relationship Between the Prime Contract and Subcontracts

Organization	Role	Document
Government	Buys from prime contractor	Prime contract
Prime contractor	Sells to government and buys from first-tier subcontractor	Subcontract
First-tier subcontractor	Sells to prime contractor and buys from second-tier subcontractor	
Second-tier subcontractor	Sells to first-tier subcontractor and buys from third-tier subcontractor	Subcontract

Prime contract and subcontracts

❑ **Note:** Although the **term subcontracting** is often used to **identify** only significant purchases by a purchaser,

every purchase order could be **considered a subcontract**

if the item purchased is used to **support** a sale to the end customer of the purchaser.

❖ **Subcontractors** may be called vendors or suppliers,

but they are subcontractors when they perform in **support of the prime contract**.



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Subcontract management – subcontract management by the life cycle phases of the Contract management standard

❑ FIGURE 8-4 presents how subcontract management is embedded in contract management life cycle phases.

FIGURE 8-4. Subcontract Management by Life Cycle Phases of the Contract Management Standard

Contract Life Cycle Phase			
	Pre-Award	Award	Post-Award
Subcontract Management Process	Identify subcontracted work and propose subcontractors in support of seller's offer	Support seller's offer regarding subcontracting through award of the contract to seller and negotiate with subcontractors in anticipation of award of the contract	Complete negotiations, award subcontracts, and manage subcontracts through closeout
Value Added	Improve seller's competitive stature by proposing subcontractors who complement seller's abilities at a competitive price	Support seller's competitive stature by ensuring buyer's understanding of subcontracted effort	Award subcontracts in a timely manner and ensure subcontracted effort is performed in accordance with subcontracts so seller's performance is performed in accordance with the prime contract

Subcontract management – subcontract management by the life cycle phases of the Contract management standard

Tasks	Conduct make/buy analysis	Respond to buyer's questions regarding proposed subcontracted work	Award subcontracts
	Identify requirements to be subcontracted	Conduct cost and price analyses on subcontractor proposals	Manage subcontracts
	Create subcontracting strategy	Conduct negotiations with subcontractors	Ensure delivery of subcontracts
	Identify responsible subcontractors	Source selection of subcontractors	Manage changes to subcontracts
	Negotiate nondisclosure agreements		Closeout subcontracts
	Negotiate teaming agreements		
	Issue solicitations to subcontractors		
	Evaluate subcontractor proposals		
	Provide subcontracting input to seller's proposal		

Manage subcontract

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Internal company organization for subcontract management **Combination of Buying and Selling**

❑ A company may **combine** buying and selling into **one organization**.

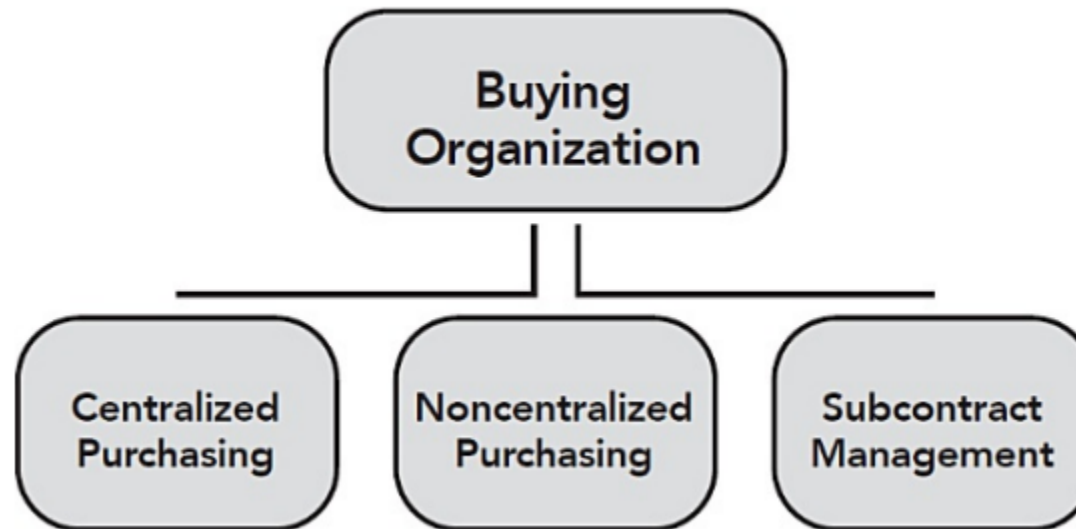
❖ *For example, in a smaller business, the vice president/director of contracts and procurement can be responsible for signing contracts on behalf of the company when selling to the government or other buyers, and for signing on behalf of the company when buying from subcontractors.*

✓ A manager with **combined roles** may have cradle-to-grave responsibility working with both the customer and the subcontractors for the same program.

Internal company organization for subcontract management – Separations within buying

- ❑ **Some organizations** find that dividing the buying organization by types of purchases is **efficient and effective**. A common example is shown in FIGURE 8-5.

FIGURE 8-5. Example of an Organizational Structure for Buying



Internal company organization for subcontract management – Separations within buying

- Typical differences between buying (whether centralized or noncentralized) and subcontract management are shown in FIGURE 8-6.

FIGURE 8-6. General Characteristics of Buying and Subcontract Management

Characteristic	Buying	Subcontract Management
Dollar value	Low	High
Volume of actions	High	Low
Complexity	Low	High
Type of work	Commercial	Noncommercial
Terms and conditions	Commercial	Commercial Plus Customer Requirements (flow downs)
Contract type	Fixed Price	Multiple
Description of work	Commercial, Build to Print, Driven by Bill of Material	Statement of work
Lead time	Shorter	Longer

Internal company organization for subcontract management – Cost of buying organization

- ❑ An **important consideration** in establishing a buying organization is how costs will be charged.
- ❖ This affects the **organization's budget** and how it develops offers on work.
 - ✓ The key aspect is to determine which costs will be direct costs and which will be indirect costs.

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Manage subcontract

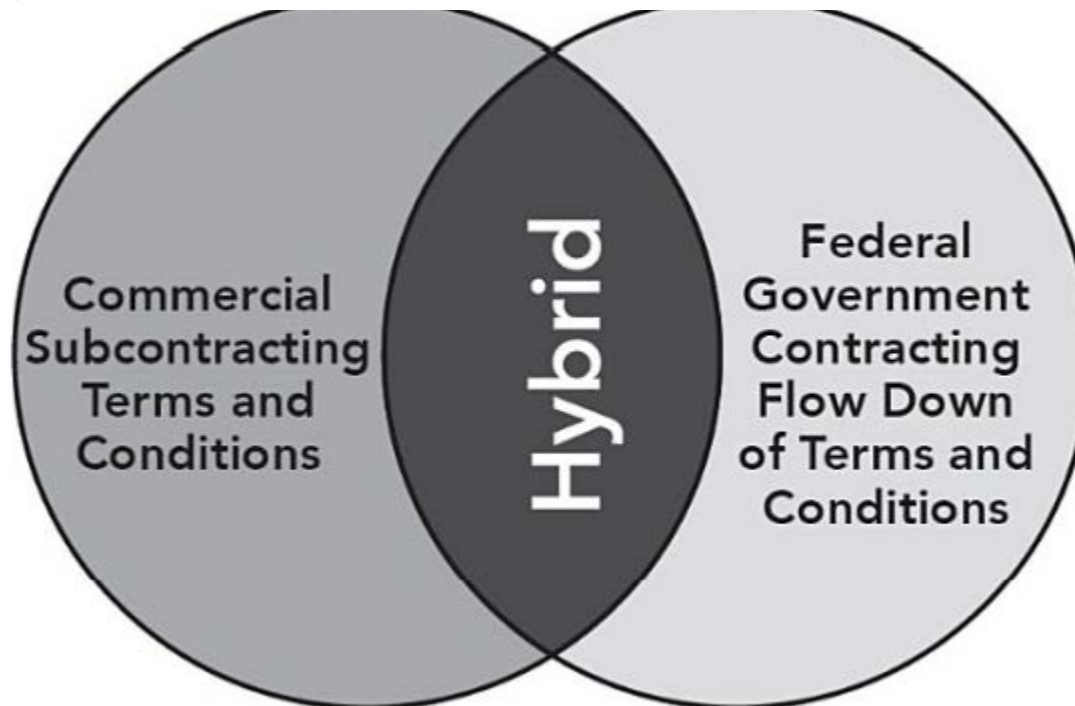
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Hybrid nature of subcontracts under U.S. Government prime contracts – Hybrid nature

- ❑ Subcontracts under a government prime contract are a hybrid of industry commercial clauses and FAR clauses, which implement federal acquisition law and regulations.

FIGURE 8-7 illustrates this relationship.

FIGURE 8-7. A Subcontract Under a Government Prime Contract is a Hybrid



Hybrid nature of subcontracts under U.S. Government prime contracts – No privity of contract

- ❑ The **government** is **not a party** to the prime/subcontractor relationship.
 - ❖ However, the government requires the **flow down** of **terms and conditions** to comply with law.
- ❑ Thus, the **prime contractor** flows down the mandatory terms and conditions to comply with its obligations **under the prime contract**.

flow down

The transfer and translation of prime contract requirements to subcontracts, and from subcontracts to lower-tier subcontracts.

Hybrid nature of subcontracts under U.S. Government prime contracts – Methods of flowing down the wording

- ❑ Three general ways to modify the wording of clauses that are **flowed down** are shown in FIGURE 8-11.

FIGURE 8-11. Ways to Modify Flowed Down Clauses

Method	Description	Pros	Cons
Substitute wording	Substitutes the wording "buyer/prime/contractor" for references to the government	Works well for large majority of clauses and saves the administrative work and expense of changing myriad clauses	Does not work well for some clauses such as "Intellectual Property," "Termination," "Protests," "Disputes," "Access to Records," or "Inspection"
Actual wording	Shows clauses in full text without reference to federal clauses	Ease of reading and reduction in ambiguities	Time and expense to establish and maintain currency of the clauses
Hybrid	Uses the substitute wording method, but clarifies where this method is not followed and provides clause-specific wording for these differences	Administratively efficient and avoids contentious substitutions	Does not mean the wording is acceptable to the subcontractor

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Teaming agreements – Industry view: Teaming arrangement types

□ Typical teaming arrangements include:

1. Partnerships,
2. Joint ventures, and
3. A prime/subcontractor team.

joint venture

The parties jointly own and manage either a partnership or a corporation established for the express purpose of entering into a contract with the customer. Neither party alone enjoys direct privity of contract with the customer; only the joint venture itself has direct privity.

Teaming agreements – Industry view: Teaming arrangement types

- ❑ A **common arrangement**, the prime/subcontractor team requires **significant subcontract management involvement** from creation to termination of the agreements.

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Teaming agreements – Industry view: Teaming agreement key elements

❑ Key elements of a teaming agreement include:

1. The purpose of the agreement;
2. The subcontractor's role in supporting the development of the prime's proposal;
3. The work share to be completed by the subcontractor;
4. The prime's obligation to award the work share to the subcontractor;
5. Conditions for the termination of the agreement; and
6. Rules regarding the creation, ownership, rights, and protections of intellectual property.

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Importance of subcontract management – Subcontract managers may manage the bulk of the prime contract

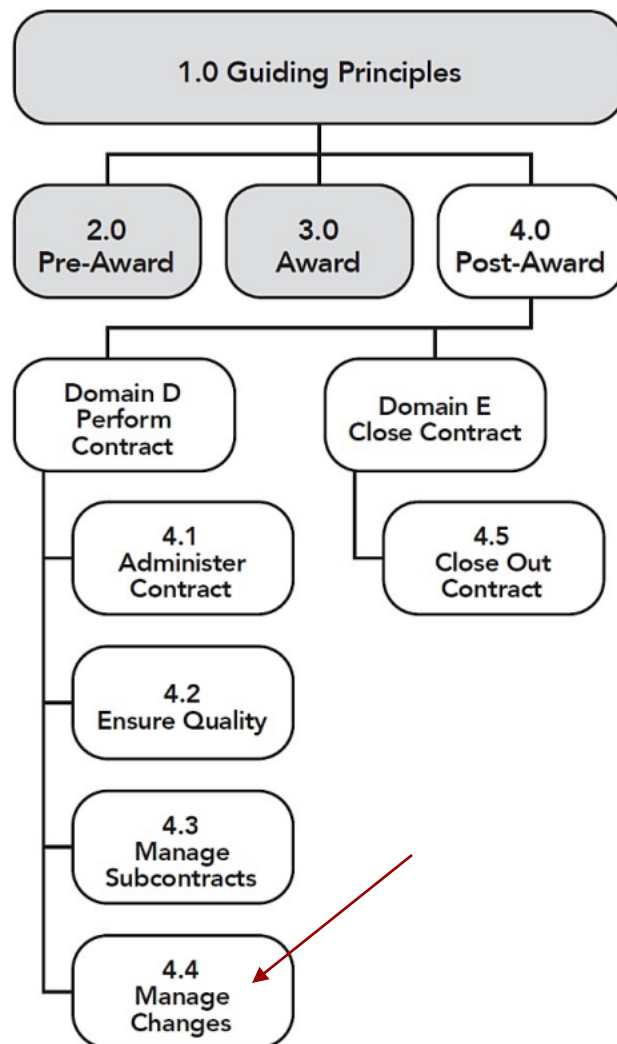
- ❑ Subcontract managers are responsible for the subcontracted effort's cost, schedule, and performance.
- ❑ Prime contractors **commonly subcontract** the bulk of cost of goods sold—
up to 80 percent of the goods or services required on the prime contract
(Raedels, 2000).

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DOMAIN D: PERFORM CONTRACT

(MANAGE CHANGES)

Manage changes



Manage changes

Manage Changes is the process of initiating, considering, negotiating, and issuing contract modifications; and maintaining configuration control of the contract and subsequent contract performance.

This process involves allowing flexibility in making necessary contract changes while protecting the integrity of the contract. Though managing changes is in the post-award life cycle phase of a contract, the Guiding Principles, contract life cycle processes, and significant outcomes are applicable to contract modifications.

Manage changes

1. Contract interpretation and disputes

2. Bilateral and unilateral changes
3. Uniform commercial code (UCC) contract modifications
4. Federal acquisition regulation (FAR) contract modifications
5. Contract changes management process
6. Contract termination

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Contract interpretation and disputes

- ❑ It is important for **contract managers** to understand contract interpretation principles in order to avoid and/or settle disputes.

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Contract interpretation and disputes

☐ Topics covered in this section include:

1. Government contract interpretation

2. Commercial contract disputes

3. Government contract disputes

4. Alternative dispute resolution

5. Best practices to mitigate contract interpretation issues

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Contract interpretation and disputes – Government contract interpretation

- ☐ (This section does not purport to provide legal advice, but to describe the **rules of contract interpretation**.)
- ☐ The following are **guidelines to contract interpretation**.

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Contract interpretation and disputes – Government contract interpretation

1. Reading the Contract

- ❖ Read the contract as a **whole**.
 - ✓ The contract is **more than just** the statement of work, prices, and delivery schedule.
- ❖ **Both parties** should read the entire document before signing to make sure that all separate parts work together and there is no apparent or real ambiguity.
- ❖ The **courts** give **preference to interpreting** the contract in ways where all terms work together and leave no clause meaningless.

Contract interpretation and disputes – Government contract interpretation

2. Order of Precedence

- ❖ Sometimes **one section** of the contract may have the **potential to conflict** with **another**.
- ❖ In that case, the parties should use an “**order of precedence**” clause to specify which section takes **priority**.
- ❖ The FAR specifies the order of precedence process (derived from FAR 52.214-29 and 52.215-8) to be used.

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Contract interpretation and disputes – Government contract interpretation

2. Order of Precedence

❖ According to the FAR, **any inconsistency** shall be resolved by giving precedence in the following order:

- ✓ The schedule (excluding the specification);
- ✓ Representations and other instructions;
- ✓ Contract clauses;
- ✓ Other documents, exhibits, and attachments; and
- ✓ The specifications.

Contract interpretation and disputes – Government contract interpretation

52.214-29 Order of Precedence-Sealed Bidding.

As prescribed in [14.201-7\(d\)](#), insert the following clause:

ORDER OF PRECEDENCE-SEALED BIDDING (JAN 1986)

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:

- (a) The Schedule (excluding the specifications);
- (b) Representations and other instructions;
- (c) Contract clauses;
- (d) Other documents, exhibits, and attachments; and
- (e) The specifications.

(End of clause)

52.215-8 Order of Precedence-Uniform Contract Format.

As prescribed in [15.209\(h\)](#), insert the following clause:

ORDER OF PRECEDENCE-UNIFORM CONTRACT FORMAT (OCT 1997)

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:

- (a) The Schedule (excluding the specifications).
- (b) Representations and other instructions.
- (c) Contract clauses.
- (d) Other documents, exhibits, and attachments.
- (e) The specifications.

Contract interpretation and disputes – Government contract interpretation

3. Defining Key Terms

- ❖ The parties **must also understand** key terms and their definitions.
- ❖ In **federal government contracting**,

U.S. courts and boards of contract appeals generally use three sources to define key contract terms:

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Contract interpretation and disputes – Government contract interpretation

3. Defining Key Terms

- i. The definitions that
 - a. the parties have incorporated into the contract document or are
 - b. referenced by law (e.g., FAR, AIA, AACE, etc.);
- ii. If
 - a. Definitions are **not incorporated** into the contract or
 - b. Are **not referenced** by law,
then dictionaries or common usage are used; or
- iii. If
 - i. Key contract term is **not defined** in the contract and
 - ii. Circumstances indicate that the intent of the parties was a **technical term, not in common usage**,
then an appropriate technical definition will be **selected**.

Contract interpretation and disputes – Government contract interpretation

4. Extrinsic Evidence

- ❖ Another important element of **contract interpretation** is extrinsic evidence.
- ❖ Extrinsic evidence consists of:
 1. Discussions and concurrent actions,
 2. Prior course of dealing between the parties, and
 3. Custom and trade usage.

Contract interpretation and disputes – Government contract interpretation

4. Extrinsic Evidence

- ❖ For example, discussions, meetings, teleconferences, or e-mails, or conduct when submitting bids, quotes, or proposals may establish the intent of the parties about the disputed terms.
- ❖ In addition, the parties' behavior after contract award, but before the controversy,
may also provide insight into how to interpret the disputed terms.
- ❖ A prior course of dealing can establish **precedence based on past actions;** thus, it can be used to **establish the intent** of the parties.

Contract interpretation and disputes – Government contract interpretation

5. Parole Evidence Rule

❖ The parole evidence rule states that

only what is written in the contract is applicable and that **all previous verbal or written statements** are not applicable.

Parol evidence rule in construction contracts

Where it is clear that the parties intended the whole of their **agreement** to be set out in one **document** or a series of **documents**, the **operation** of the **parole evidence rule** will prevent the parties from relying on extrinsic evidence to try and amend the terms of their **agreement**. For example, evidence of **negotiations** that took **place** prior to the conclusion of the contract will not be admissible.

The **parole evidence rule** applies both to oral evidence and to documentary evidence, for example letters and minutes of meetings. It is not an absolute rule however and there are exceptions as the **courts** adopt a **commonsense** approach to the question of interpretation of contracts. In particular, if there is some **uncertainty** or ambiguity as to the intentions of the parties then the **courts** are prepared to look at what has been described as the **matrix** of a contract, that is to say the surrounding circumstances, background and **commercial** purpose of the **agreement** (see *Prenn v Simmonds*).

https://www.designingbuildings.co.uk/wiki/Parol_evidence_rule_in_construction_contracts

Contract interpretation and disputes – Government contract interpretation

6. Contra Preferentem Rule (Many references call it Contra Proferentem Rule)

- ❖ **Contra Preferentem** is the Latin term for interpretation against the drafter.
- ❖ In accordance with Restatement (Second) of Contracts, Section 206:
 - ✓ In choosing among the reasonable meanings of a promise or agreement or term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.
 - For example, if the **buyer wrote the ambiguous contract**, then the **seller's interpretation will likely be considered** the valid interpretation.

Contract interpretation and disputes – Government contract interpretation

7. Clarification

- ❖ Understand and practice the **duty to seek clarification**.
- ❖ If an item or items of contract interpretation **come to light**,
then the party that identifies said contract interpretation issue(s)
must bring these issues to the attention of the other party in a
timely fashion.

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7. Clarification

- ❖ For **contra preferentem to be applicable**, the non-drafting party must seek clarification of any ambiguity that
 1. It has been made aware of, or
 2. Should have been made of,
before contract award.
- ❖ For example, **if a contractor fails** to inquire about an ambiguous term or conflicting requirements prior to the contract award,
it **forfeits the opportunity to rely** on its interpretation and thus bears the risk of misinterpretation. (Garrett 2010)

Contract interpretation and disputes

☐ Topics covered in this section include:

1. **Government contract interpretation**

2. **Commercial contract disputes**

3. Government contract disputes

4. Alternative dispute resolution

5. Best practices to mitigate contract interpretation issues

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