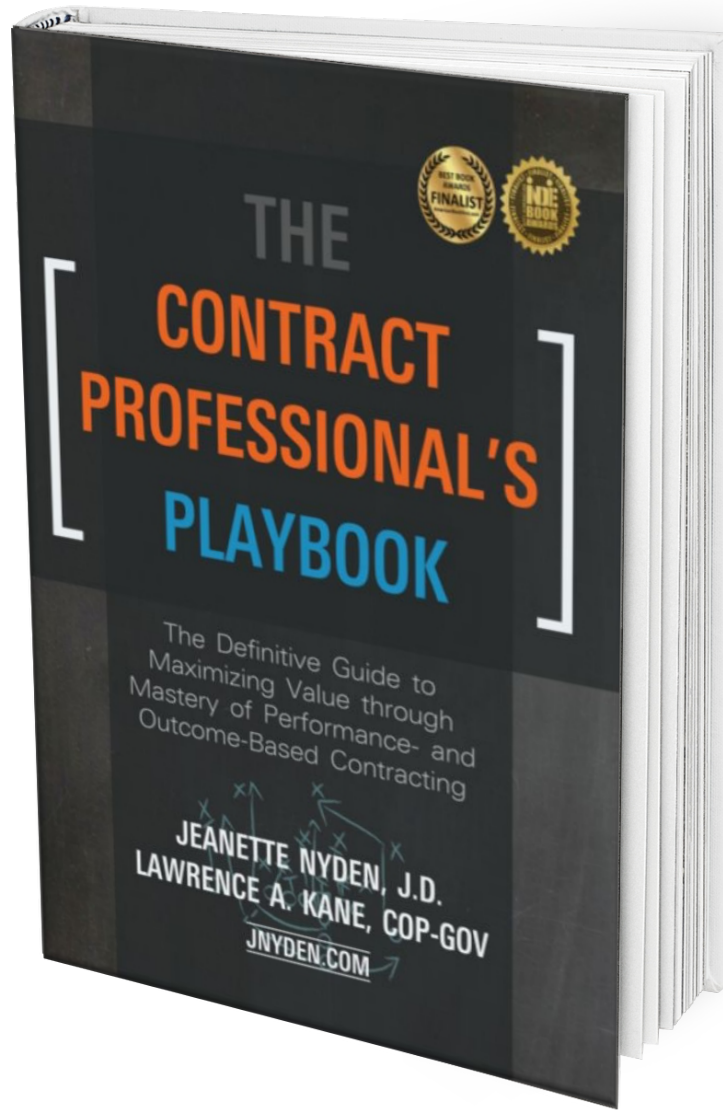


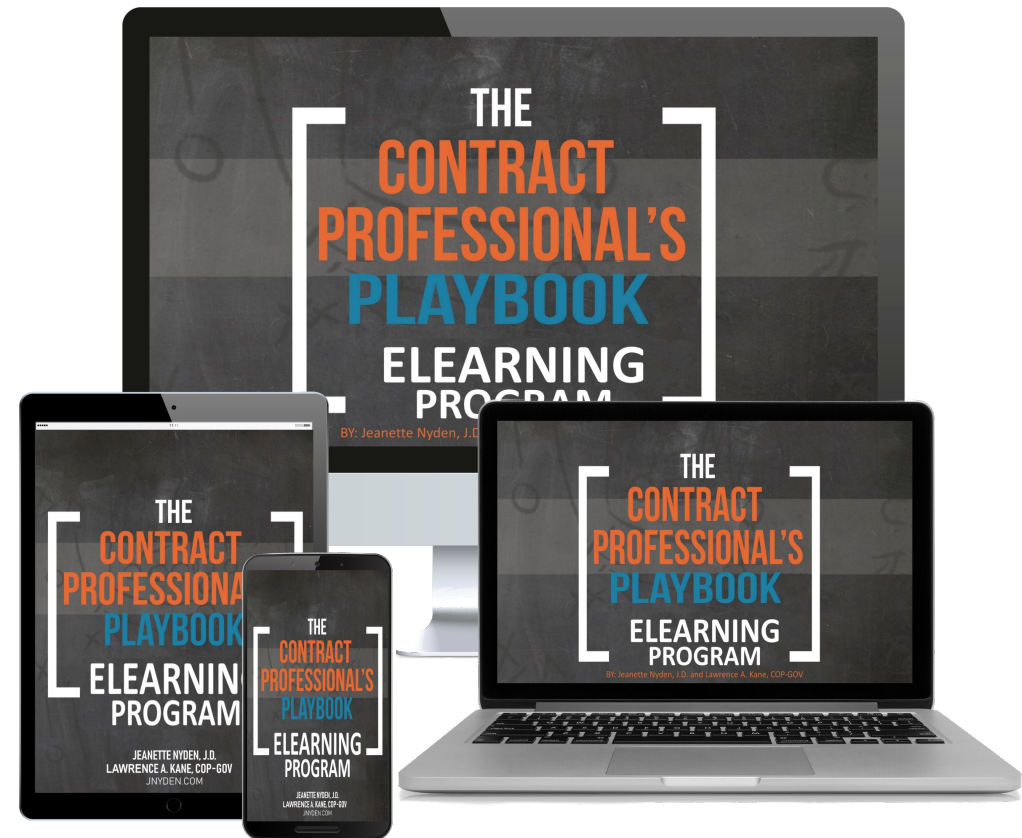
Webinar: Identifying, Analyzing and Documenting Risk in a Contract

*Appropriate for buy-side
and sell-side contract
professionals.*





**A 12-Week Master Class Teaching
Leaders to Master the Skills to
Successfully Negotiate Complex
Commercial Contracts with Nuance,
Accuracy and Confidence!**



The playbook and corresponding eLearning program provides

1) The tools and techniques to consistently implement and master performance-based commercial contracting, and

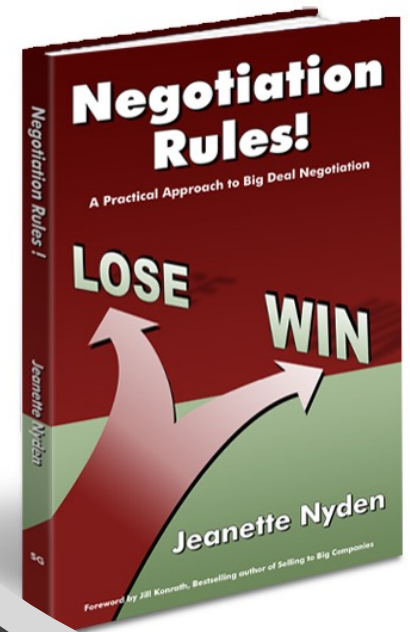
2) Is designed to meet commercial contracting competencies to develop, negotiate, and manage performance-based contracting.



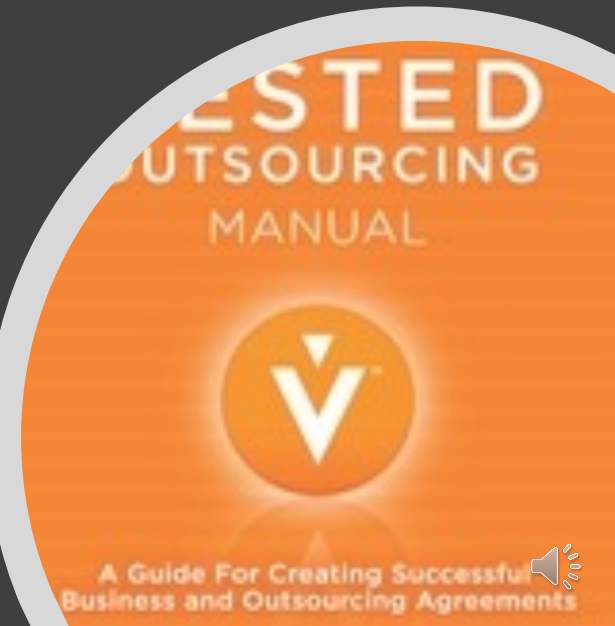
THE
CONTRACT
PROFESSIONAL'S
PLAYBOOK
A Practical Guide to Maximizing Value

WE

Negotiating Agreements
for Highly Collaborative
Relationships



Jeanette Nyden, J.D.
*Training the Next Generation of
Contract Professionals.*





Lawrence Kane,
SIG Super Nova Hall
of Fame Member,
and IAOP
COP-GOV



7 How Do I Identify, Analyze And Document Risk?



Chapter 7 Sections

Introduction

Definition of Risk

Risk Management in the Contract Life Cycle

Identifying Risk

Risk Management Goals

Communicating Risk Mitigation and/or Allocation in the Contract

Jeanette's Coaching Questions



Module Learning Objective

Identify and document various types of risk in the contract to control risk events and associated losses and to drive performance.



Contract Professional Competencies

- Initiate the contract Terms.
- Identify risks in the SOW (or bid package for the supplier).





The contract professional's goals are to protect your organization and reduce or eliminate exposure to value leakage or loss by identifying and documenting risk on behalf of your organization, and document risk allocation and mitigation in the Terms and Conditions.



KEY TO SUCCESS

The key to your success is to identify potential risks and associated losses to ensure that your organization is protected with the inclusion of relevant contract language.



Chapter 7 Sections

Introduction

Definition of Risk

Risk Management in the Contract Life Cycle

Identifying Risk

Risk Management Goals

Communicating Risk Mitigation and/or Allocation in the Contract

Jeanette's Coaching Questions



Leaky Faucet Syndrome

**Bottom Line
Impact**

-9% to -45%

Value leakage

IACCM

Aberdeen Group

IAOP



Boilerplate Language

- Limitations of Liability
- Indemnification
- Infringement protection



Statement of Work

Look for risks in the parties' performance—their obligations to one another.



Receivers of
products and
services want to
**reduce, mitigate,
or control known
risks.**



Don't Do This Alone!

Stakeholder Analysis

Stakeholder Name/Title	Business Objective(s)	External Challenges	Internal Challenges

Stakeholder Analysis Tool created by Jeannette Wyden, J.D. All content copyrights are registered to her, © 2014-2017.

You may consider conducting a stakeholder analysis,

- Determine what leader(s) has the delegated authority to decide how much risk to accept in any given customer/supplier relationship.
- Know who at your organization has executive responsibility for the contract(s) you draft, negotiate or manage.
- Ensure that appropriate leader/stakeholder reviews and approves the levels of risk accepted and/or allocated to the other party.



“Commercial contractual risk management involves the calculated actions to reduce the severity, frequency, and unpredictability of damages, losses and claims.” Calculated actions include strategic (systematic and ongoing plans and associated contract language) and operational (plans and contract language for this transaction).

From:

<http://read.nxtbook.com/ncma/contractmanagement/january2014/managingcontractualriskissues.html>



Your Role?

If after reading this chapter you determine it is not your responsibility to identify, analyze and document risk, you need to know who in your organization will identify, analyze and document risk. Your task shifts to ensuring that the risk assessment gets done before the contract is executed.



Chapter 7 Sections

Introduction

Definition of Risk

Risk Management in the Contract Life Cycle

Identifying Risk

Risk Management Goals

Communicating Risk Mitigation and/or Allocation in the Contract

Jeanette's Coaching Questions



Risk is generally defined as the possibility that an event will occur that will adversely affect the achievement of the customer/supplier relationship objectives.



More Definitions of Risk

- **Contract risk:** The probability of loss to the supplier from a customer terminating a valid contract, and/or the probability of loss to either party from failure in contract performance.
- **Legal Risk:**
 - The risk of loss to an institution which is primarily caused by:
 - A party's failure to comply with statutory or regulatory obligations;
 - A defective transaction;
 - A claim (including a defense to a claim or a counterclaim) being made or some other event occurring which results in a liability for the institution or other loss (for example, as a result of the termination of a contract);
 - Failing to take appropriate measures to protect assets (for example, intellectual property) owned by the organization or institution; or
 - Change in law



Chapter 7 Sections

Introduction

Definition of Risk

Risk Management in the Contract Life Cycle

Identifying Risk

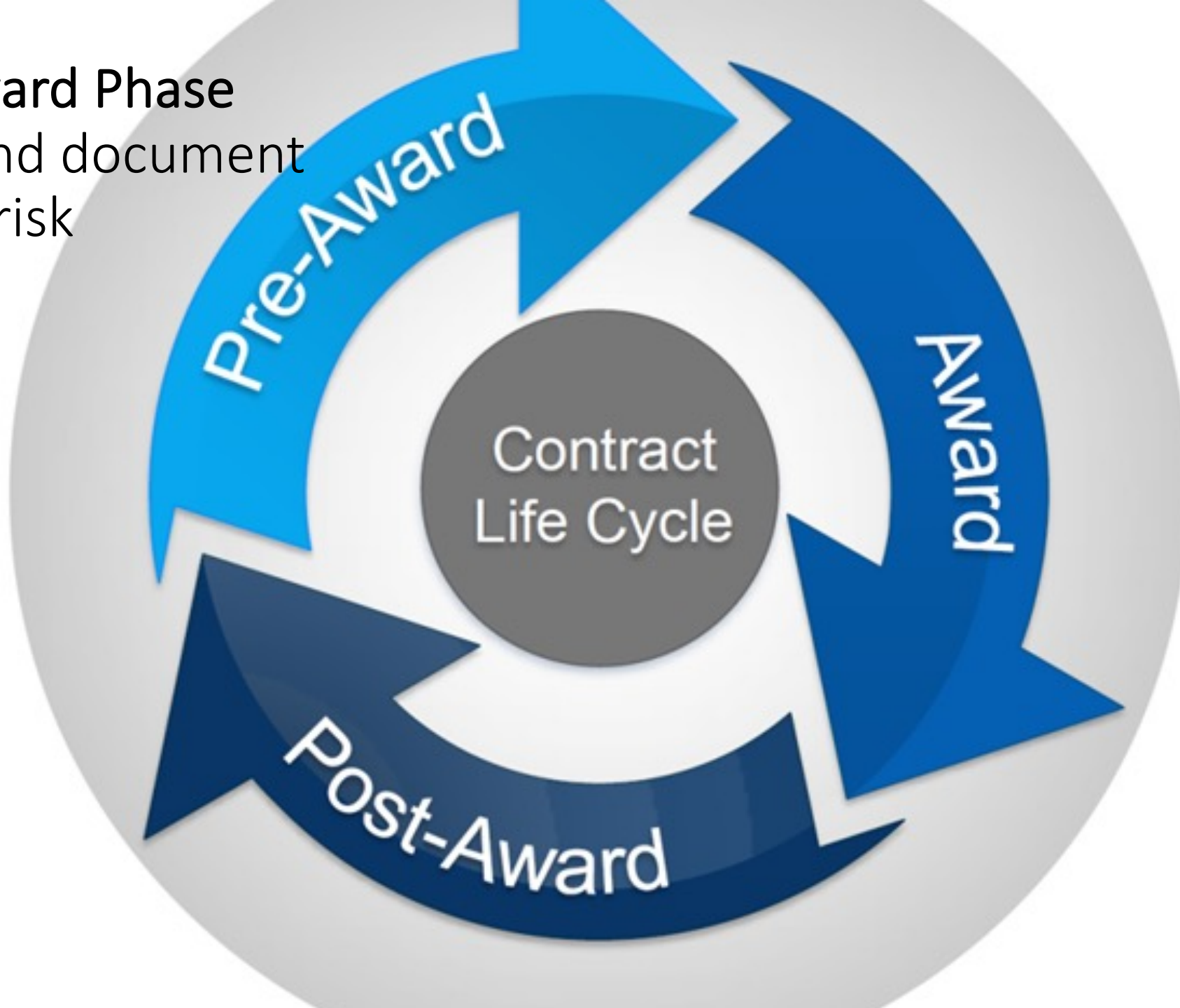
Risk Management Goals

Communicating Risk Mitigation and/or Allocation in the Contract

Jeanette's Coaching Questions



Pre-Award Phase
Identify and document
risk





- In general, the contract professional should consider whether:
 - It is possible to avoid the risks completely, or
 - Accept a probability of the risk's occurrence and then plan actions which would mitigate or control the risk's potential impact in the delivery of goods or services and as outlined in the contract language.





Post-Award
Phase
Manage and
control risk



Chapter 7 Sections

Introduction

Definition of Risk

Risk Management in the Contract Life Cycle

Identifying Risk

Risk Management Goals

Communicating Risk Mitigation and/or Allocation in the Contract

Jeanette's Coaching Questions



4 Step Process



Work with the receiving party to identify operational risks that are most likely to happen.



Match the risk event to an operational solution in the SOW.



Then match the operational solution from the SOW to a performance provision in the contract (i.e. delivery schedules).



Then read the rest of the contract for additional support (i.e. in ensuring on-time delivery).



Requirements Checklist for Service

Use this checklist to define the functional and technical requirements for the service.

Instructions

1. Please answer each relevant question. Your answers to the completed questions will become part of the Statement of Work and will influence some of the terms and conditions in the final contract. The contract team will align these requirements and the contract terms and conditions.
2. These lists are not exhaustive; these questions are just the beginning of your conversation with your organization's stakeholders. So, in your own daily work, start with this list and build on it.
3. These questions may also help you identify risks and associated losses. Please see below for instructions on the inclusion of your answers in the Risk Monitoring Template (not included in the free sample).
4. These questions and answers will also help form your Contract Summary for eventual contract management.

Business Objectives (Why do the work)

- ☐ What is causing the need, problem, challenge or issue?
- ☐ What is the supplier doing to meet this need, problem or challenge?
- ☐ Is the supplier providing services directly to the buying company or providing services to the customer on behalf of the buying company? (*potentially a risk factor*)
- ☐ What outcome is the buying company looking for from this supplier?
 - o Deliver _____ to _____ on time for proper maintenance of _____.
 - o Provide a stable "app" that allows _____ to more easily _____ when scheduling appointments with _____.
 - o Provide a platform to easily track _____, which will allow the company to better track _____ for financial reporting.
 - o Write your statement here.
- ☐ Summarize here: What is the purpose of the contract? (This will be used in any RFP or solicitation for a competitive bid/quote, and may serve as a charter or mission statement for the relationship.)

© Jeanette Nyden All Rights Reserved. 2003-2018

Page 1 of 19

© Jeanette Nyden. All Rights Reserved. 2003-2018 www.nyden.com | in@nyden.com Page 1 of 5

themes

Two Approaches to Identify Risks

Use checklists to review the requirements (such as the Statement of Work, or Technical Requirements).



Risk Checklists

(one document-4 parts)

1. Financial considerations
2. Hybrid contract considerations
3. Intellectual property considerations: Custom software
4. SaaS agreement considerations

RISK CHECKLISTS

INSTRUCTIONS

Identifying risk is a good thing to do. The goal of any risk analysis is to identify, document and monitor the risk in order to minimize the possibility of the risk event happening and associated loss to your organization. Thoroughness is a pro-active posture that protects your organization.

Start the process to identify the risks by answering questions in the Requirements Checklist, or something similar that outlines the requirements and performance standards. To fill out the template, follow the columns from left to right. Use the colors at the bottom of the template (red, yellow, green) to designate the level of risk. The colors will give you and your stakeholders a quick visual impression of the risk.

Once you've identified the risk, its probability and severity, determine how frequently you will monitor the risk. Finally, in the last column, locate the contract provision associated with the risk in column A. For example, if the supplier delivered "non-conforming" services, the "Corrective Action Plan" and warranty language are corresponding contract provisions.

YOUR ROLE

Identifying risk is an iterative process. As you conduct the analysis, you will either use this template or build your own risk assessment tool. Your role is to work collaboratively with your organization's leadership, Subject Matter Experts, the legal department, and any other department that can provide input on issues pertaining to risk.

If you do not know--ask for help.

Your organization owns the risk. Therefore leaders need to be aware of the risk and possibility of associated losses. If it is not within your delegated authority to accept a risk, set up a meeting to discuss risk with your organization's leadership. Use the Risk Monitoring template and/or this checklist, or a similar tool when discussing risk with the leader. Traceability is a very important part of your organization's risk plan.

YOUR ORGANIZATION'S POLICY

Follow your organization's internal policies to prioritize risk. Your organization may have its own template, policies and processes. Please work within your organization's policies, and modify the template and analysis for the work you do for your organization. This analysis checklist and the template is ONE way to identify and monitor risk. This is a good overall introduction, and the expectation is that you will build on these documents for the work you perform.



Sample Questions: Risk Checklists

Some potential areas of concern are:

- ☐ Is the supplier providing goods/services directly to the customer or providing goods/services to the community on behalf of the customer?
- ☐ Is the supplier buying goods for the customer from another supplier (original equipment manufacturer)? If yes,
 - Is the supplier passing through warranties from the manufacturer?
 - Is the supplier purchasing from a distributor?
 - Or, is the supplier using their own warranty provision to warrant the materials?
- ☐ What are the customer's obligations to the supplier (technical drawings, approvals, etc.)? List obligation requirements that when missed can create a risk event.



Activity

Add at least 10 questions pertaining to risk to one of the checklists to customize it for your daily work.



Start with the broad themes, such as hand-offs between a customer to a supplier, or from one supplier to another supplier working for the customer on the same project.

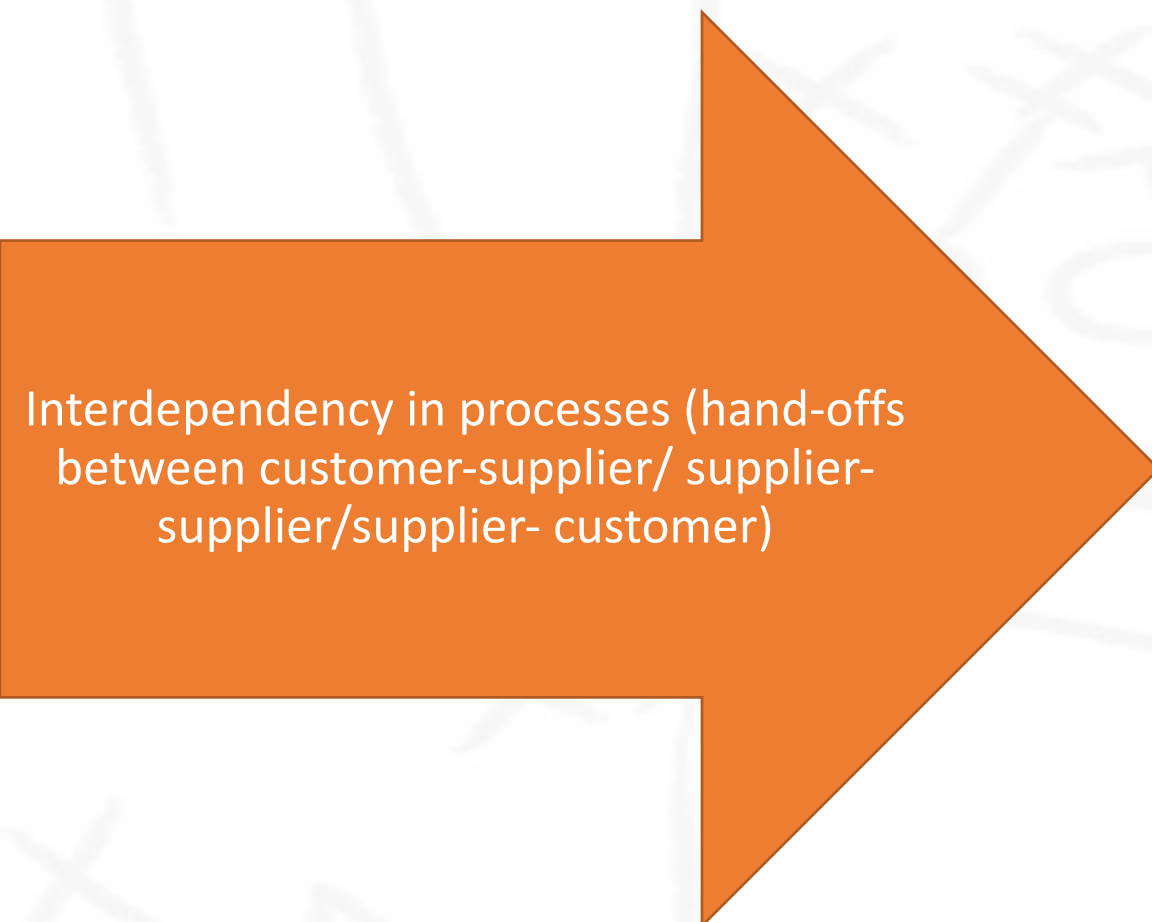




Operational Risk

- Interdependency in processes (hand-offs between customer-supplier/supplier-supplier/supplier-customer)

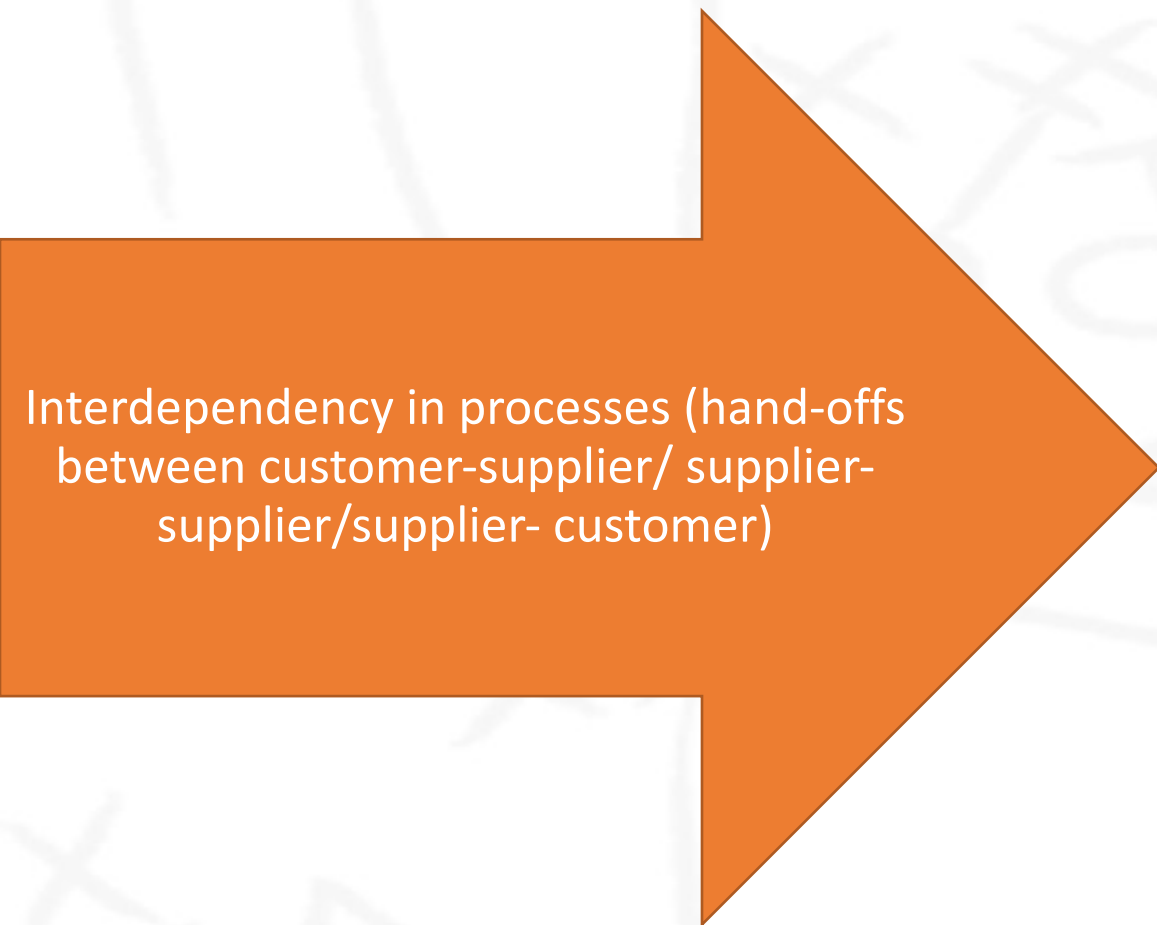




Interdependency in processes (hand-offs between customer-supplier/ supplier-supplier/supplier- customer)

- Look at Statement of Work
 - Transition Planning Schedule,
 - Schedule of Supplier Milestone Dates,
 - Are there other milestone dates listed (for customer or other supplier's part of the work),
 - Acceptance procedure.





Interdependency in processes (hand-offs between customer-supplier/ supplier-supplier/supplier- customer)

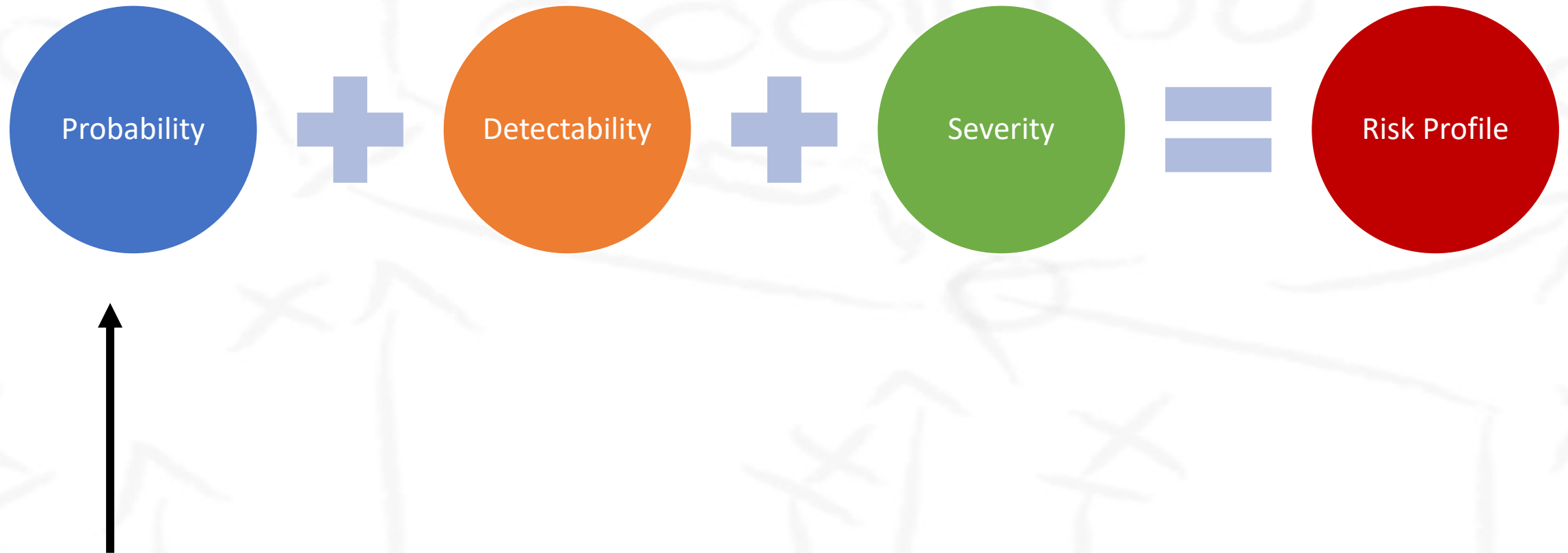
- Look at Contract Terms
 - Definitions (Milestone, Complete, Step-In Rights),
 - Connect Milestone Dates and Payment Schedules,
 - Corrective Action Planning for “Defective” work,
 - Scope Change (Is there a process to modify schedules but not increase the price?).





Analyze Risk







Risk Profile

4 Ways to Address Risk in a Contract



1

Allocate risk and payment for loss: One party allocates risk to the other through Limitation of Liability, Indemnification, Waiver of Subrogation clauses, etc.

2

Mitigating the impact of risk and loss: The parties identify and address the risk in the Statement of Work, performance standards, testing, approvals, acceptance criteria, etc.

3

Control the impact risk and loss: The parties use Insurance policies, or following laws, regulations and policies, to control the impact.

4

Accept the risk: Typically, one party will accept a risk rather than shift it to the other party.



Chapter 7 Sections

Introduction

Definition of Risk

Risk Management in the Contract Life Cycle

Identifying Risk

Risk Management Goals

Communicating Risk Mitigation and/or Allocation in the Contract

Jeanette's Coaching Questions



Minimize or Mitigate Risk



Monitor Risk



What this means to you



Use a risk register to identify, analyze, and monitor risk. The Risk Monitoring Template becomes a risk register when completed.



Risk Monitoring Template; Completed It Becomes the Risk Register

	A	B	C	D	E	F	G	H	I	J	K	L
1	Risk Monitoring Template											
2												
3												
4	Questions and Answers from the Requirements Checklist	Describe Risk Description / Reason	Probability of Occurrence (High/Med/Low)	Describe Impact on Project	Severity (High/Med/Low)	Immediate Short-Term or Long Term	Mitigation Plan	Frequency of Monitoring (daily, weekly, monthly, quarterly, annually)	Responsible Party	Target Date to Resolve	Status	Corresponding Contract Provisions to Mitigate the Risk
5												
6	From the contracts requirements checklist * Is the vendor providing goods/services directly to the community on behalf of the agency?											
7												
8												
9												
10												
11												
12	Probability of Occurrence/Severity		Timeline for risk event			Frequency of Monitoring						
13									Daily			
14									Weekly			
15									Monthly			
16									Quarterly			
17									Annually			



Activity

Look at the Risk Monitoring Template. Does your organization use something like this?



Control Risk





What this means to
you

Control risk using the T&Cs.



Chapter 7 Sections

Introduction

Definition of Risk

Risk Management in the Contract Life Cycle

Identifying Risk

Risk Management Goals

Communicating (documenting) Risk Mitigation and/or Allocation in the Contract

Jeanette's Coaching Questions



Disclaimer!

Please use the following information as guidance only--a starting point for conversations to further develop the contract language according to your organization's policies.



Contract Provisions

Statement of work	Payment type (fixed, fee, cost, time and materials)	Term (period of performance)
Schedule	Inspection and testing	Acceptance, delivery criteria
Shipping Terms	Limitations on liability	Waivers
Indemnifications, IP indemnifications	Insurance	Warranties and disclaimers
Performance standards	Termination, cancellation	IP ownership, licensing, etc.
Confidentiality, non-disclosure	Force majeure	Compliance
Dispute resolution	Time, delivery, schedules	Quality, quality assurance plans or audits
Health and safety	Choice of law	Assignment
Written notices	Modification procedures and authority	Taxes





A Word of Caution

The legal clauses included in the contract and that parties commonly negotiate are designed to allocate losses in a risk event between the parties, not necessarily minimize, monitor or control the risk.



Activity

Look at your risk contract provisions (Limitation of Liability, Indemnification, Warranty etc.). Do they adequately address risks in the agreement?



12 “How do I questions”

Pre-Award

Week 1: How do I increase my influence with stakeholders and manage power plays?

Week 2: How do I choose/respond to the sourcing/acquisition approach and contract type?

Week 3: How do I write/revise/respond to requirements (SOW and Performance Metrics)?

Week 4: How do I choose the right pricing mechanisms (i.e. fixed fee, cost pass through etc.). And, how do I prepare to effectively negotiate price?

Week 5: How do I identify, analyze and document risk?

Award

Week 6: How do I master price negotiations to preserve value? And, how do I effectively make tradeoffs in complex negotiations?

Week 7: How do I increase my influence with my negotiation counterpart? And, how do I effectively use my leverage?

Week 8: How do I use and manage tactics? And, how do I effectively develop a negotiation strategy?

Week 9: How do I efficiently and effectively redline a complex contract and take issues to stakeholders for approval?

Post-Award

Week 10: How do I effectively monitor, manage and govern a complex relationship? And, how do I insert a change control process into the contract?

Week 11: How do I more effectively resolve disputes?

Week 12: The end: How do I track lessons learned, terminate a relationship early and develop an orderly exit plan?



The Contract Professional's Playbook eLearning program can be delivered in two ways



PUBLIC OR OPEN ENROLLMENT –
PERFECT FOR TEAMS OF 1-5



PRIVATE COMPANY TEAM—PERFECT
FOR TEAMS OF 5 OR MORE

Use the payment for this webinar as a credit towards the full 12-week program.
www.jeanettenyden.simplero.com



Other Services: email jn@jnyden.com



Customized Contract Negotiation and Management Skills Programs

Pre and Post Skills Assessment

In-person session(s)

Case study and role plays to cement learning

Post-training coaching



Contract Negotiator—Mentor

Sit as a credentialed advisor to co-lead complex contract negotiations from development to management



Chapter 7 Sections

Introduction

Definition of Risk

Risk Management in the Contract Life Cycle

Identifying Risk

Risk Management Goals

Communicating Risk Mitigation and/or Allocation in the Contract

Jeanette's Coaching Questions





Jeanette's Coaching Questions

1. What risks have you identified using the **Requirements Checklist**?
2. If you have questions about risk, or if it is not your responsibility to perform a risk analysis, who can you ask to get the answers?
3. Where in the contract are common risks for this type of contract addressed? (Look beyond the typical language such as limitations of liability and look at compliance language instead.)
4. Are there any risks that are uncommon in your typical customer/supplier contract templates? If so, who at your organization ought to be a part of the decision-making process to address that uncommon risk?
5. What is the proposed contract language to address that risk? (Is it a legal term, clearer acceptance criteria, reporting schedules using meaningful metrics?)
6. If you have questions about how to address risk in drafting new Terms in the contract, who will you go to for advice?



Key Take Aways

- By understanding risk concepts and analysis, you can increase the inclusion of relevant contract language to help monitor and mitigate risk to prevent loss.
- The key to success is to work with your organization to identify potential risks and associated losses to ensure that your organization is protected with the inclusion of relevant contract language.





Thank you!

