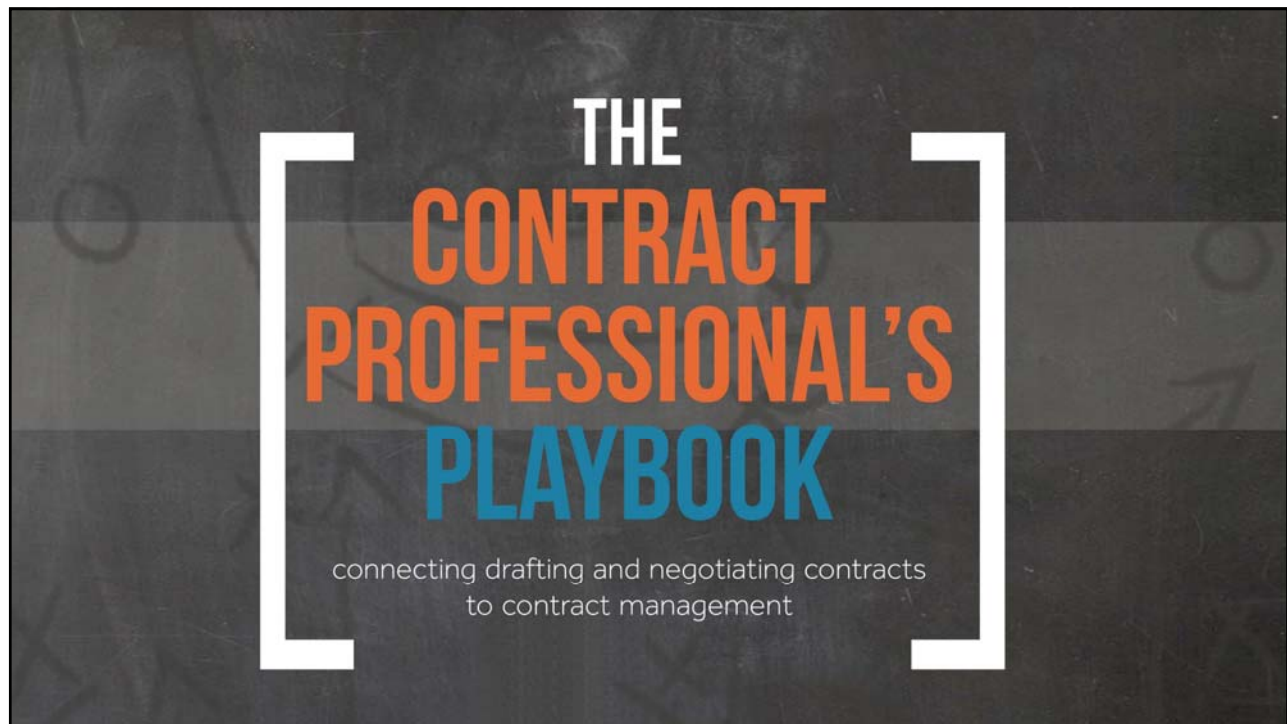




1 pm Keynote Address:
"Performance-Based
Contracting and
Negotiations"

Jeanette Nyden, JD
Commercial Contracting Coach
Sound Partnership Strategies, Inc.





Performance-Based Contracting and Negotiations

Jeanette Nyden, JD
October 19, 2018

Welcome!

Agenda

Introduction

Why Use Performance-Based Contracts

What is a Performance-Based Contracts

How to Draft and Monitor Performance

Techniques to Increase Influence

Wrap Up

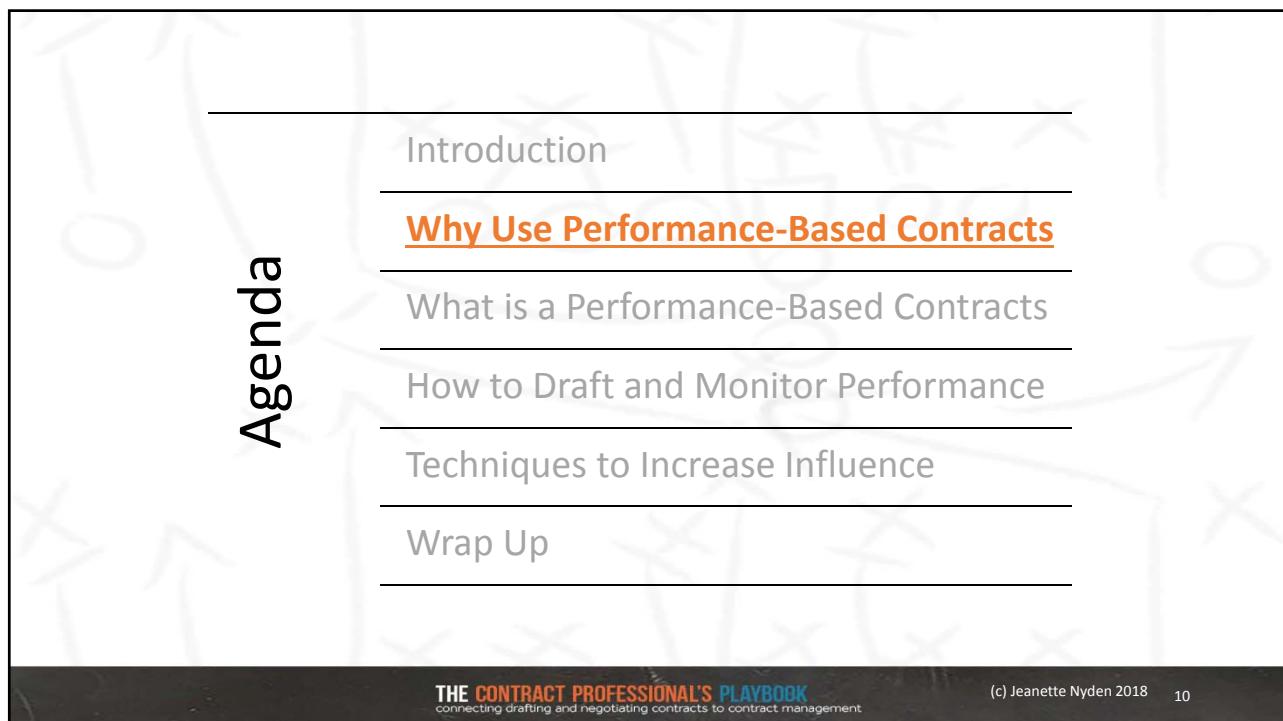
The Goal of Performance-Based Contracts



The goal of any State of Hawaii agency/vendor relationship is to meet the State's (agency's) business objectives. A performance-based contract uses mechanisms to ensure performance to meet the business objectives.

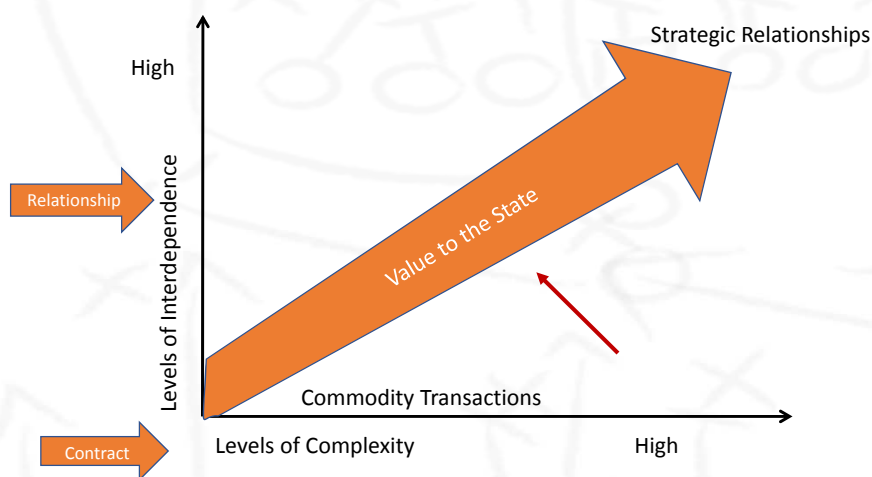
State of Washington: RCW 39.26.180(3)

“To the extent practicable, agencies should enter into performance-based contracts. Performance-based contracts identify expected deliverables and performance measures or outcomes. Performance-based contracts also use appropriate techniques, which may include but are not limited to, either consequences or incentives or both to ensure that agreed upon value to the state is received. Payment for goods and services under performance-based contracts should be contingent on the contractor achieving performance outcomes.”

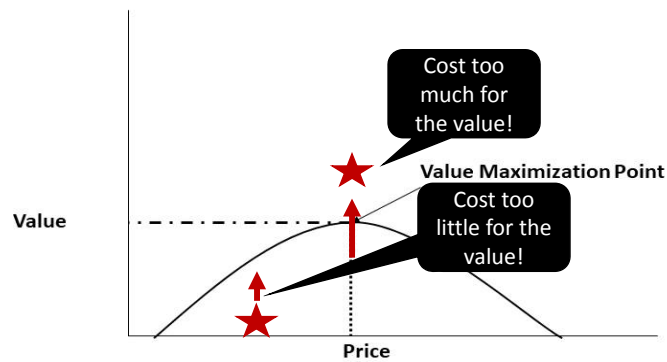


Chapter 3: How do I Choose/Respond to the Sourcing (Acquisition) Approach and Contract Type?

Acquisition Approach



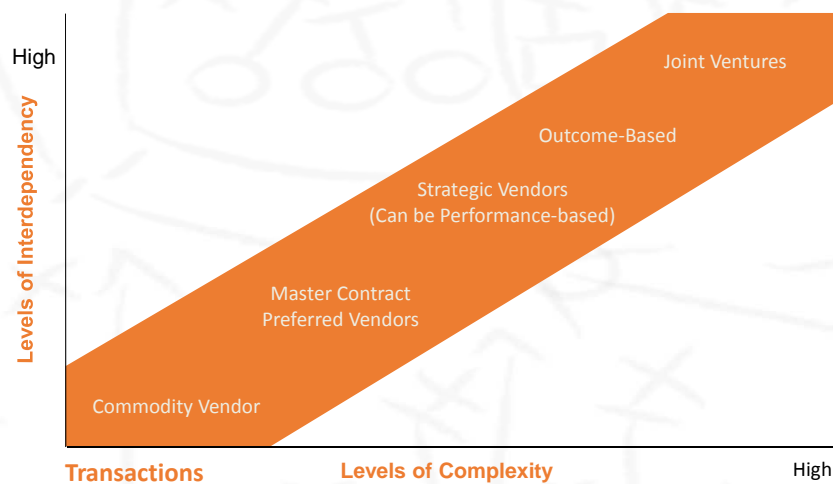
The Goal: A High Value Deal



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Acquisition Approach



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Performance Based Contracts

- Typically, Performance-based contracts contain the following five critical components:
 1. Performance Work Statement (PWS) a.k.a. Performance-based Statement of Work (SOW),
 2. Quality Assurance Surveillance Plan (QASP),
 3. Performance-Based Metrics,
 4. Contractual incentives (positive and/or negative), and
 5. The right pricing arrangement.

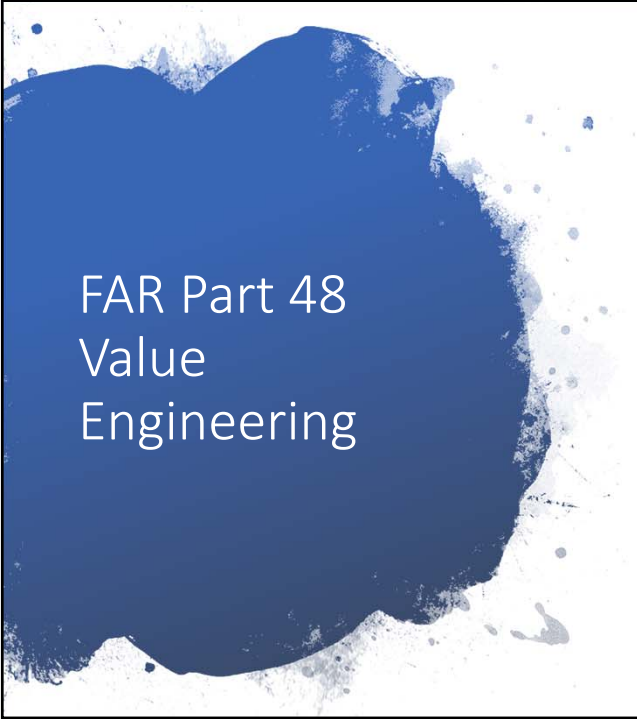


Performance Based Contracts

There are some examples of governmental performance based contracting relationships that pay vendors for performance that exceeds documented performance standards. For example, the Federal Department of Energy's contract with Kaiser-Hill and the "Power by the hour" contract between the U.S. Airforce and Rolls Royce plc.

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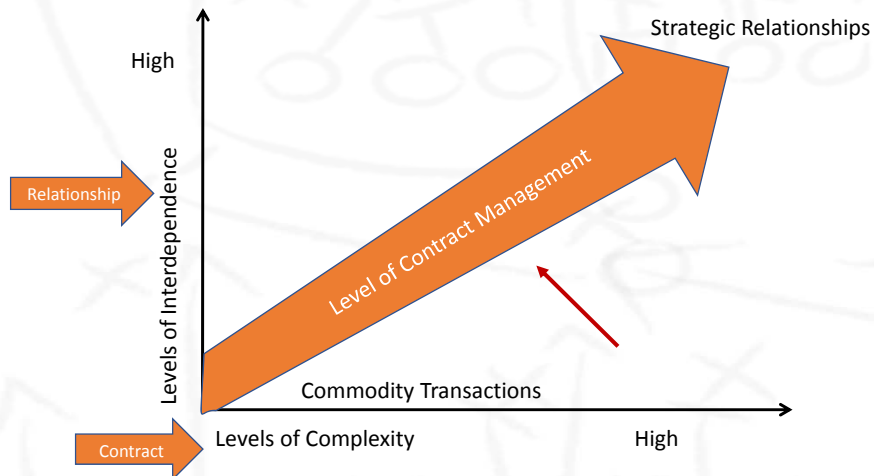
FAR Part 48 Value Engineering

This regulation includes mechanisms to share savings with vendors who perform their services more economically. FAR Part 48 contains both voluntary and involuntary provisions.

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Level of Contract Management



I wonder if my agency has any performance-based agreements?



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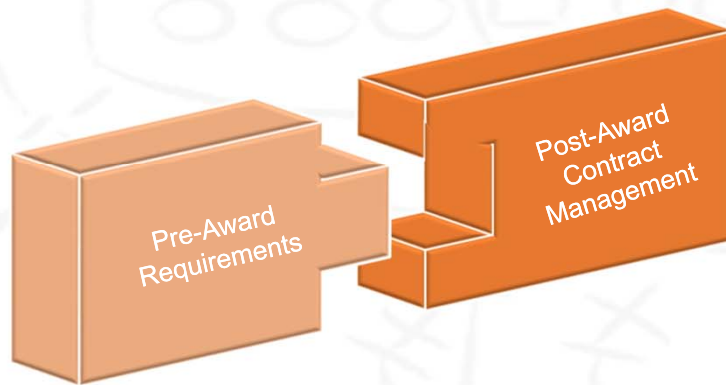
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Chapter 4: How Do I Write/Revise/Respond to Requirements (SOW and Performance Metrics)?

Ensure the contract includes accurate requirements to more successfully monitor and manage vendor performance.



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Step #1 Outline the Business Objectives

The business goals/objectives are the starting point for all aspects of the agreement, not the contract template.

1

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The Work Will Answer These Questions

These are overarching questions that technical descriptions of the goods or services will answer.

- What are the business objectives for the vendor relationship?
- What will the vendor do to meet that objective?
- How will the contract manager/project manager make sure that the vendor is meeting that objective?

Step #2—Understand and Document the Functional and Technical Specifications

This step emphasizes your role to completely define the description of the goods and/or services.



Technical and Functional Specifications

Some common ways to contractually document specifications are:

- Description of the goods – technical and functional specifications.
- SOW – A Statement of Work for goods and service related contracts.

Accepting Performance

What happens if the goods/services don't meet expectations?

- “Conditional acceptance” means to pay only when some condition occurs such as the shipment or delivery of certain goods.
- Acceptance criteria provide guidance about how and when the work is complete. Complete can mean a part of the units are delivered or all the units must be delivered at one time.
- Please see the Defined Terms in the contract for the applicable definition.

Step #3 Refining the Requirements Using Performance Metrics

What gets measured gets done. Contract managers/project managers will want to incorporate and monitor the vendor's performance in the form of metrics, SLAs or KPIs.



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Performance Standards

Metrics, Service Level Agreements (SLAs) and Key Performance Indicators (KPIs) are agreed upon performance measures.

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Performance Standards

- A **metric** is an objective unit of measurement for some form of performance that the Agency is seeking.
- On time delivery of any good or item is a metric.
- The State can document the expected delivery date and verify that the good or service arrive on, before, or after that delivery date.
- Simpler contracts will have/should still have metrics, to meet performance-based contracting preferences.

Performance Standards

- When chosen, implemented and monitored performance measures can help determine/establish:
 - Precise delivery standards, such as quality, responsiveness, and/or efficiency;
 - An objective means for determining if ongoing performance meets expectations;
 - An objective basis for triggering damages based on poor performance;
 - Valuable trends and operational data that enables the Agency to identify and correct problems; and
 - A foundation for making informed adjustments in service delivery to meet changing business requirements in the next cycle of bidding for the work.

Metrics

Clarify the following into unit of measurement, if you can.

☐ What other objective factors will the State use to verify the work?

- Goods: think of things like, define complete delivery, partial delivery, “defective goods”, etc.
- Services: think of things like, number of visits, number of people served, software functions for a time period without failing, reports delivered, etc.

• List the unit of measurement here:

_____. If there is no unit of measurement, complete the internal documents to provide to the Contract Professional.

Metrics

If there is a unit of measurement, answer these questions:

- ☐ Who will record the data about this unit of measurement?
- ☐ How often will the recording party collect the data?
- ☐ In what form will the recording party report the data?
- ☐ How will the receiving party validate that the data is accurate?
- ☐ Who will review that data?
- ☐ Who at the State will approve of the data?

Small Group Activity

Follow the instructions for Part I of the case study.

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Want to learn more?

email me at in@jnyden.com

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Chapter 2: How do I Increase My Influence with Stakeholders?



Influence

Influence is a critical “soft skill”. It is the most effective and collaborative way to get people to change positions, attitudes and beliefs so that both of you can achieve the common goal of reaching a favorable agreement.

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KEY TO SUCCESS

By making your message attractive, you have control over how you convey a message, even when your message is being re-conveyed to another stakeholder in your absence.

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Clarifying Questions

- Clarifying questions are open ended questions that allow the speaker to talk at length about a need, concern or issue that is important to him or her.
- These questions are expansive and help you mine for information in a gentle way to use to influence stakeholder's when making requests.

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Sample Clarifying Questions

Try these clarifying questions, or create your own.

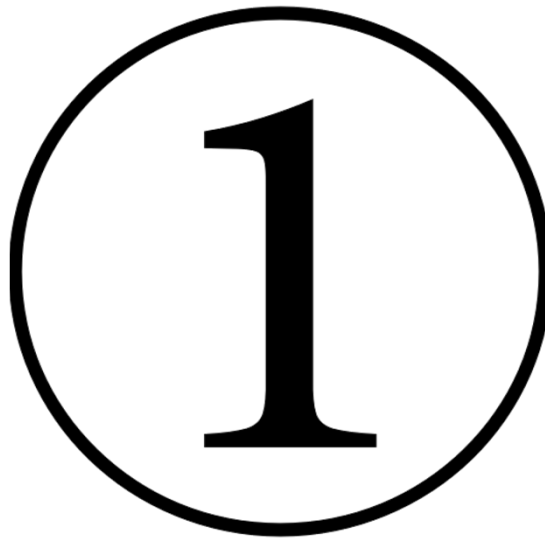
- What is your greatest concern with . . . ?
- What bothers you the most about that suggestion?
- What about . . . is important to you?
- Can you tell me more about
- What does . . . *look like* to you?
- How can we make our request fit your need to {spell their need and/or concern}?
- What is the most/least important thing you need in this situation?
- How important is . . . to the overall picture?
- How do you see that we can accomplish . . . ?
- If you were in my shoes, what would you recommend?
- What are the impacts of this (proposal, issue, suggestion) to the Agency, community the Agency serves or the vendor?

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Five Rules of Making the Message Attractive

Make the Information,
Data, Proposal,
Counteroffer, or
Solution Attractive



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Five Rules of Making the Message Attractive

Make Complex
Information Simple.



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Five Rules of Making the Message Attractive

Actively Listen to
Your Stakeholders



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Five Rules of Making the Message Attractive

Leverage Common
Ground



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Five Rules of Making the Message Attractive

Craft a Message that Speaks to Everyone



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Contract managers/program managers should resolve disputes quickly. Do not ignore any red flags, such as missed milestone dates or unpaid invoices. Unresolved disputes will only grow out of proportion.

Best Practices

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Correcting Problems

Ultimately, you will be asking the vendor to take actions to correct the problem with their good or service (corrective action) and cure the defect (cure).

Corrective Actions and Cures

Corrective actions and cures can be defined terms in your contract. Please read your contract's defined terms to learn if and how they are defined.

If defined, follow the provisions in your contract regarding a corrective action or cure.

The Contract Manager's Role

The contract manager's/program manager's role is to settle all issues and problems at their level of authority where appropriate. When the dispute cannot be settled with your level of authority, escalate the issue to the appropriate State person to aid in resolution.




Escalation

- Factors:
 - Complexity of the contract and issues involved,
 - Difficulty of the relationship,
 - Potential for significant disruption of the contract, and
 - The probability that the dispute will escalate.

Small Group Activity

Follow the instructions for Part II of the case study.

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Where does trust fit in?

The illustration shows a group of stylized human figures in various shades of gray, some standing and some sitting, arranged in a loose cluster. A thought bubble originates from the group, containing the text 'Where does trust fit in?'. The background is white with faint, light gray hand-drawn sketches of arrows, circles, and 'X' marks, suggesting a brainstorming or strategic planning session.

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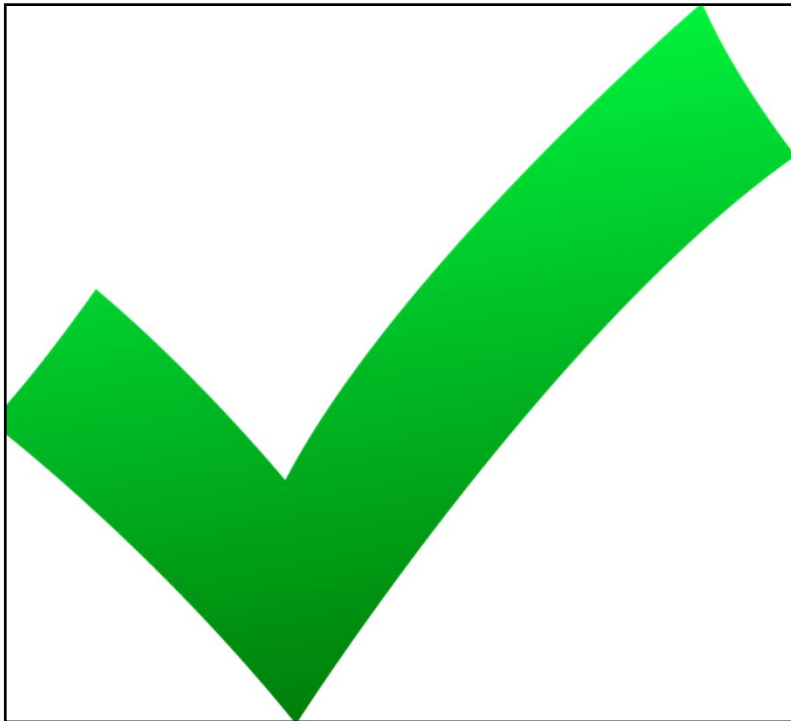
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What Are
Your Key Take
Aways?