

# Crafting Communication Clarity

## A six session course on drafting and negotiating better contracts and file documentation

A Guide for Practitioners and Lawyers

Technical writing for contracts, negotiations, and file documentation

# Crafting Communication Clarity: Mastering Business Writing for Influence and Compliance

## Session 4

Preserving the Record – Create file documentation that is contemporaneous, correct, and complete. Improve your professional writing skills and stand out in the competitive world of clear and persuasive government contract documentation.

# Scope of Course

This is a six-week (9 hours) course to help writers to craft language in contracts and supporting documentation for clarity and defense of the reasonableness of their decisions.

It will cover material relevant to contract administrators at both the prime and subcontract levels for better persuasion and certainty in the business transaction.

# Limitations

This class cannot cover everything you should have learned in high school English or several semesters of College composition classes. Thus the brevity of this material is, at best, an attempt to refresh what you learned or provide a framework within which your contracts and file documentation will stand up to scrutiny or audit.

Additional, continual study of effective communication skills is highly recommended

# Course Learning Objectives

- Using Grammar and Punctuation for clarity
- Understanding audience and message
- Using the right words
- Understanding that Business writing is technical writing intended to explain, persuade, sell, or provide documentation related to decisions
- Understanding that all writing must stand on its own and be clear, complete, concise, and convincing
- Crafting Contracts to achieve business certainty

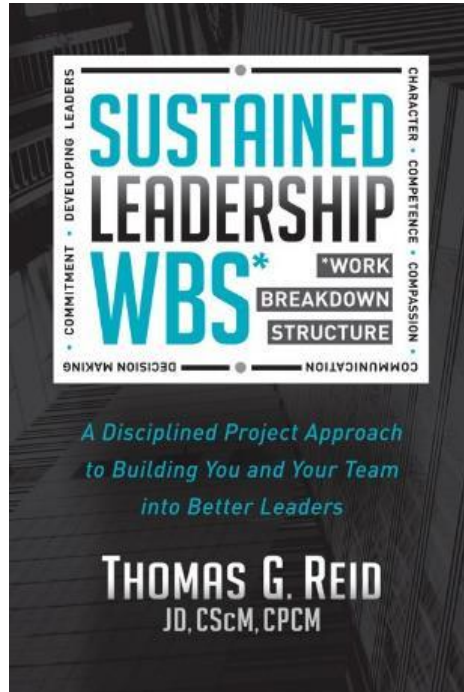
# Expected Transformational Experience

"Enhanced Professional Prestige and Advancement Opportunity: Developing greater writing proficiency opens doors to advanced leadership roles and consulting opportunities within contract management disciplines. Clear and compelling communication becomes a hallmark of your professional identity, positioning you for success in a competitive business landscape."

# Who am I?

- Thomas Reid, JD, MPA, CPCM,
- Chief Problem Solver, CCS
- Decades in government contracting
- Served in government, large businesses, small businesses, 8(a), non-profit, and start-up
- Speaker, author, trainer, attorney, expert witness, and contract manager

# Latest Publication



- Reveals 229 elements of leadership
- Provides a lexicon of leadership by defining each element
- Uses project management tools to help you build yourself into a sustained leader
- Covers the Professional Competencies defined by OPM

New learning platform at [www.TalkingHeadAcademy.Thinkific.com](http://www.TalkingHeadAcademy.Thinkific.com) provides CPEs for NCMA certification for all classes on the platform.



# The Communication of a Sustained Leader

## 4 Communication

### 4.1 Style

4.1.1 Speak

4.1.2 Teach

4.1.3 Mentor and Coach

4.1.4 Criticism

4.1.5 Meetings

4.1.6 Write

## 4.2 Content and Audience

4.2.1 Values and Mission

4.2.2 Positions and Persuasion

4.2.3 Proposals

4.2.4 Clarity

4.2.5 Conviction

4.2.6 Consistency Of Message

4.2.7 Credible

4.2.8 Feedback

4.2.9 Tact

4.2.10 Negotiations

4.2.10.1 Concessions and Compromise

4.2.10.2 Alliances

4.2.11 Enthusiasm

4.2.12 Deals with:

4.2.12.1 Employees or Those You Lead

4.2.12.2 Press

4.2.12.3 Other Stakeholders

4.2.12.4 Regulators

4.2.12.5 Customers and Beneficiaries

4.2.12.6 Problems

4.2.13 Diplomatic

4.2.14 Understands

Importance Of Sound Bite

4.2.15 Saying "Sorry" and "Thanks"

## 4.3 Charisma

4.3.1 Personable Warmth

4.3.2 Direct

4.3.3 Socially Adept

## 4.4 Techniques

4.4.1 Good Questions

4.4.2 Good Story Teller

4.4.3 Able to Adjust

Message to Audience Level

4.4.4 Able to Simplify

4.4.5 Body Language

# Summary

- Session 1 Using Grammar and Punctuation for clarity
- Session 2 Understanding audience and message
- Session 3 Explaining, persuading, selling, and proving reasonableness of decisions through business writing
- **Session 4 Creating clarity in file documentation**
- Session 5 Understanding and presenting data – technical, financial, statistics
- Session 6 Crafting clear contracts for business certainty

# Summary

- **Session 4 Creating clarity in file documentation**
- **Putting it all together; review**
- **Why are we writing?**
- **What are we writing?**
- **To whom are we writing?**
  - **Correspondence?**
  - **Consistency and Accuracy**

# Polling Question

My role in the contracting process is as:

- A. Contracting officer or specialist (Gov)
- B. Government contract manager (Indus)
- C. Pricing analyst
- D. Administrative CO
- E. Closeout specialist
- F. COR

# *Putting it All Together: a Review*

## SECTION 1

# Communication

- ***Many contract disputes arise because different people attach different meanings to the same words and conduct.***

**Restatement (Second) of Contracts, §2 (1981), comment b,  
Manifestation of Intention**

# Time to Apply What We've Learned

- Clarity through grammar and punctuation
- Clarity through aligning audience and message
- Clarity through Ethos, Pathos, and Logos

*“Thinking is difficult, that’s why people prefer to judge.”*

- Carl Jung

# Building a Credible Record

- Preserving the Record –
  - Create file documentation that is:
    - contemporaneous,
    - correct, and
    - complete.
  - Improve your professional writing skills; become the model, the leader, on outstanding file documentation that substantiates certainty in the business transaction.



*Why we are writing?*

## SECTION 2

# Contemporaneous, Correct, and Complete

“... AOC [protestor] contends that the Library **unreasonably assigned CenturyLink’s proposal an acceptable rating** under the staffing factor because CenturyLink failed to provide information required by the RFP and **the agency provided no explanation for the acceptable rating.** ...

“The Library states that the **solicitation gave it discretion** to determine whether offerors’ proposals satisfied solicitation instructions. [Cites omitted.] The Library also states that CenturyLink’s **proposal discussed all required staffing and expertise** relevant to accomplishing its proposed solution. In this regard, the Library states that CenturyLink **‘interspersed’ explanations throughout its proposal** of the expertise and services to be provided by personnel as related to design support, network engineering support, network monitoring, and maintenance.”

# Rule #1

“In reviewing an agency’s evaluation of proposals and source selection decision, we will examine the supporting record to determine whether the decision was reasonable, consistent with the stated evaluation criteria, and adequately documented. [Cite omitted.] While we will not substitute our judgement for that of the agency, we will sustain a protest where the agency’s conclusions are inconsistent with the solicitation’s evaluation criteria, undocumented, or not reasonably based.”

# Rule #2

“It is a fundamental principle of government accountability that an agency be able to produce a sufficient record to allow for a meaningful review where its procurement actions are challenged. See e-LYNXX Corp., B-292761, Dec. 3, 2003, 2003 CPD ¶ 219 at 8 (even for procurements conducted under simplified acquisition procedures, an agency must have a sufficient record to allow for a meaningful review). Where an agency fails to document or retain evaluation materials, it bears the risk that there may not be an adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for the source selection decision.”

## Rule #3

“In response to the protest ground, the agency identified sections of CenturyLink’s proposal that it contends contains information pertaining to the “skills and experience of the offeror’s proposed non-key personnel” that were to be evaluated under the solicitation. ... However, **the contemporaneous record** does not demonstrate how these sections of CenturyLink’s proposal contain information pertaining to the “skills and experience of the offeror’s proposed non-key personnel” that were to be evaluated under the solicitation.”

# Decision

“As discussed ..., we conclude that **the contemporaneous record is devoid of evidence** the agency considered CenturyLink’s proposed staffing, and we sustain the protest on this basis.”

“We recommend that the Library **reevaluate** CenturyLink’s proposal in accordance with the terms of the solicitation **and document both its evaluation and a new source selection decision**. We also recommend that the **protester be reimbursed** its reasonable costs of filing and pursuing the protest, including attorneys’ fees.”

*AOC Connect, LLC, B-416658, B-416658.2; November 8, 2018*

# FAR Subpart 4.8 - Government Contract Files

## 4.800 Scope of subpart.

This subpart prescribes requirements for establishing, maintaining, and disposing of contract files.

## 4.801 General.

(a) The head of each office performing contracting, contract administration, or paying functions shall establish files containing the records of all contractual actions.

(b) The documentation in the files (see 4.803) shall be sufficient to constitute a complete history of the transaction for the purpose of-

- (1) Providing a complete background as a basis for informed decisions at each step in the acquisition process;
- (2) Supporting actions taken;
- (3) Providing information for reviews and investigations; and
- (4) Furnishing essential facts in the event of litigation or congressional inquiries.

(c) The files to be established include-

- (1) A file for cancelled solicitations;
- (2) A file for each contract; and
- (3) A file such as a contractor general file, containing documents relating, for example-to-
  - (i) No specific contract;
  - (ii) More than one contract; or
  - (iii) The contractor in a general way (e.g., contractor's management systems, past performance, or capabilities).

# FAR 4.802 Contract files.

(a) A contract file should generally consist of-

(1) The contracting office contract file that documents the basis for the acquisition and the award, the assignment of contract administration (including payment responsibilities), and any subsequent actions taken by the contracting office;

(2) The contract administration office contract file that documents actions reflecting the basis for and the performance of contract administration responsibilities; and

(3) The paying office contract file that documents actions prerequisite to, substantiating, and reflecting contract payments.

(b) Normally, each file should be kept separately; however, if appropriate, any or all of the files may be combined; e.g., if all functions or any combination of the functions are performed by the same office.

(c) Files must be maintained at organizational levels that ensure-

(1) Effective documentation of contract actions;

(2) Ready accessibility to principal users;

(3) Minimal establishment of duplicate and working files;

(4) The safeguarding of classified documents; and

(5) Conformance with agency regulations for file location and maintenance.

(d) If the contract files or file segments are decentralized (e.g., by type or function) to various organizational elements or to other outside offices, responsibility for their maintenance must be assigned. A central control and, if needed, a locator system should be established to ensure the ability to locate promptly any contract files.

(e) Contents of contract files that are contractor bid or proposal information or source selection information as defined in 2.101 must be protected from disclosure to unauthorized persons (see 3.104-4).

(f) Agencies may retain contract files in any medium (paper, electronic, microfilm, etc.) or any combination of media, as long as the requirements of this subpart are satisfied.



*What are we writing?*

SECTION 3

# FAR 4.803 Contents of contract files.

The following are examples of the records normally contained, if applicable, in contract files:

- (a) Contracting office contract file.
  - (1) Purchase request, acquisition planning information, and other presolicitation documents.
  - (2) Justifications and approvals, determinations and findings, and associated documents.
  - (3) Evidence of availability of funds.
  - (4) Synopsis of proposed acquisition as required by part 5 or a reference to the synopsis.
  - (5) The list of sources solicited, and a list of any firms or persons whose requests for copies of the solicitation were denied, together with the reasons for denial.
  - (6) Set-aside decision (see 19.1506) including the type and extent of market research conducted.
  - (7) Government estimate of contract price.
  - (8) A copy of the solicitation and all amendments thereto.
  - (9) Security requirements and evidence of required clearances.
  - (10) A copy of each offer or quotation, the related abstract, and records of determinations concerning late offers or quotations. Unsuccessful offers or quotations may be maintained separately, if cross-referenced to the contract file. The only portions of the unsuccessful offer or quotation that need be retained are-
    - (i) Completed solicitation sections A, B, and K;
    - (ii) Technical and management proposals;
    - (iii) Cost/price proposals; and
    - (iv) Any other pages of the solicitation that the offeror or quoter has altered or annotated.

# FAR 4.803 Contents of contract files.

- (11) Contractor's representations and certifications (see 4.1201(c)).
- (12) Preaward survey reports or reference to previous preaward survey reports relied upon.
- (13) Source selection documentation.
- (14) Contracting officer's determination of the contractor's responsibility.
- (15) Small Business Administration Certificate of Competency.
- (16) Records of contractor's compliance with labor policies including equal employment opportunity policies.
- (17) Data and information related to the contracting officer's determination of a fair and reasonable price. This may include-
  - (i) Certified cost or pricing data;
  - (ii) Data other than certified cost or pricing data;
  - (iii) Justification for waiver from the requirement to submit certified cost or pricing data; or
  - (iv) Certificates of Current Cost or Pricing Data.
- (18) Packaging and transportation data.
- (19) Cost or price analysis.
- (20) Audit reports or reasons for waiver.

# FAR 4.803 Contents of contract files.

- (21) Record of negotiation.
- (22) Justification for type of contract.
- (23) Authority for deviations from this regulation, statutory requirements, or other restrictions.
- (24) Required approvals of award and evidence of legal review.
- (25) Notice of award.
- (26) The original of-
  - (i) The signed contract or award;
  - (ii) All contract modifications; and
  - (iii) Documents supporting modifications executed by the contracting office.
- (27) Synopsis of award or reference thereto.
- (28) Notice to unsuccessful quoters or offerors and record of any debriefing.
- (29) Acquisition management reports (see subpart 4.6).
- (30) Bid, performance, payment, or other bond documents, or a reference thereto, and notices to sureties.
- (31) Report of postaward conference.

# FAR 4.803 Contents of contract files.

- (32) Notice to proceed, stop orders, and any overtime premium approvals granted at the time of award.
- (33) Documents requesting and authorizing modification in the normal assignment of contract administration functions and responsibility.
- (34) Approvals or disapprovals of requests for waivers or deviations from contract requirements.
- (35) Rejected engineering change proposals.
- (36) Royalty, invention, and copyright reports (including invention disclosures) or reference thereto.
- (37) Contract completion documents.
- (38) Documentation regarding termination actions for which the contracting office is responsible.
- (39) Cross-references to pertinent documents that are filed elsewhere.
- (40) Any additional documents on which action was taken or that reflect actions by the contracting office pertinent to the contract.
- (41) A current chronological list identifying the awarding and successor contracting officers, with inclusive dates of responsibility.
- (42) When limiting competition, or awarding on a sole source basis, to economically disadvantaged women-owned small business (EDWOSB) concerns or women-owned small business (WOSB) concerns eligible under the WOSB Program in accordance with subpart 19.15, include documentation-
  - (i) Of the type and extent of market research; and
  - (ii) That the NAICS code assigned to the acquisition is for an industry that SBA has designated as-
    - (A) Underrepresented for EDWOSB concerns; or
    - (B) Substantially underrepresented for WOSB concerns.

# “Other” contract Files

## **FAR 4.803 Contents of contract files. (continued)**

(b) Contract administration office contract file.

[20 items]

(c) Paying office contract file.

[4 items]

## **1.604 Contracting Officer’s Representative (COR).**

A contracting officer’s representative (COR) assists in the technical monitoring or administration of a contract (see [1.602-2\(d\)](#)). The COR shall maintain a file for each assigned contract. The file must include, at a minimum—

- (a) A copy of the contracting officer’s letter of designation and other documents describing the COR’s duties and responsibilities;
- (b) A copy of the contract administration functions delegated to a contract administration office which may not be delegated to the COR (see [1.602-2\(d\)\(4\)](#)); and
- (c) Documentation of COR actions taken in accordance with the delegation of authority.

# Polling Question

FAR offers a list of how many items to include in the contracting officer's Contract file?

- A. 3
- B. 42
- C. Life the universe and everything
- D. FAR is not specific

# *Who is the Audience?*

## SECTION 4



# Subpart 1.7 - Determinations and Findings

## 1.700 Scope of subpart.

This subpart prescribes general policies and procedures for the use of determinations and findings (D&F's). Requirements for specific types of D&F's can be found with the appropriate subject matter.

## 1.701 Definition.

Determination and Findings means a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contract actions. The "determination" is a conclusion or decision supported by the "findings." The findings are statements of fact or rationale essential to support the determination and must cover each requirement of the statute or regulation.

## 1.702 General.

(a) A D&F shall ordinarily be for an individual contract action. Unless otherwise prohibited, class D&F's may be executed for classes of contract actions (see 1.703). The approval granted by a D&F is restricted to the proposed contract action(s) reasonably described in that D&F. D&F's may provide for a reasonable degree of flexibility. Furthermore, in their application, reasonable variations in estimated quantities or prices are permitted, unless the D&F specifies otherwise.

(b) When an option is anticipated, the D&F shall state the approximate quantity to be awarded initially and the extent of the increase to be permitted by the option.

# 1.704 Content.

Each D&F shall set forth enough facts and circumstances to clearly and convincingly justify the specific determination made. As a minimum, each D&F shall include, in the prescribed agency format, the following information:

- (a) Identification of the agency and of the contracting activity and specific identification of the document as a "Determination and Findings."
- (b) Nature and/or description of the action being approved.
- (c) Citation of the appropriate statute and/or regulation upon which the D&F is based.
- (d) Findings that detail the particular circumstances, facts, or reasoning essential to support the determination. Necessary supporting documentation shall be obtained from appropriate requirements and technical personnel.
- (e) A determination, based on the findings, that the proposed action is justified under the applicable statute or regulation.
- (f) Expiration date of the D&F, if required (see [1.706](#)).
- (g) The signature of the official authorized to sign the D&F (see [1.707](#)) and the date signed.

# 1.707 Signatory Authority

When a D&F is required, it shall be signed by the appropriate official in accordance with agency regulations. Authority to sign or delegate signature authority for the various D&F's is as shown in the applicable FAR part.

# Incorporating EVERY Law

## 1.602-1 Authority.

...

(b) No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

# Incorporating EVERY Law (Part II)

## 1.602-2 Responsibilities.

Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall-

(a) Ensure that the requirements of [1.602-1](#)(b) have been met, and that sufficient funds are available for obligation;

....

# New Case

See Handout

- *MPG West, LLC v. Secretary of Defense*

# What Is a High Quality Contract?

- Contract type represents reasonable apportionment of risk
- Requirements match the financial arrangement
- Contract clauses represent applicable laws and regulations
- Delivery/performance schedule is reasonable for desired goods or services
- Profit/fee is reasonable for work to be performed, the risk assumed, and reflects current economic conditions
- The document is devoid of ambiguities
- The document both includes and omits what it should
- Internal consistency is maintained amidst modifications

# What Is a High Quality Contract File?

- Each decision is documented and justified
- Checklists and forms are appropriate *if properly completed*.
- Any future reviewer can understand WHAT was done and WHY
  - Contracting parties
  - Internal reviewers
  - Any CO who inherits the file
  - Auditors
  - Lawyers and adjudicating bodies
- Ancillary files are archived with it (e.g. I&A)
- All documents are devoid of ambiguities
- All communications are included



# Drafting Points

- Consider ALL of the potential audience members
- Follow prescribed formats
  - Pay attention to “substantially as follows” and “is suggested” language
- Run an independent check on ALL references:
  - They exist and are accessible to the parties
  - The proper version is cited
  - The name is consistent
- Ethos, Pathos, Logos

# Cut and Paste

- From the internet – DON'T
- From any source that you either:
  - Do not have reason to trust it
  - On any topic you do not understand (e.g. Arbitration or other Alternative Dispute Resolution)
- From a prior contract
  - ONLY to prevent extensive retyping of boilerplate
  - HOWEVER; read it carefully to avoid issues we've discussed in this class.

# Common Problems

- Not considering the range of possible audience members
- Not clearly articulating what and why
- Making leaps of logic or using logical fallacies
- Not clearly articulating the decision
- Not creating the documentation contemporaneously
- Not proofreading (or otherwise checking)
- Not archiving the proper version of references

More commonly a result of:

**Sloppy Drafting**

# Plain Language Review

- Simpler is better and more clear
- Avoid redundancies
- Follow definitions
- Apply systems thinking when making mods

*Eschew obfuscation.*

# Correspondence

## SECTION 4A

# Email Greetings

Appropriate greetings

Seasonal

Time of Crisis – “Hope you are well” during virus crisis.

Formulaic

***Courtesy never goes  
out of style!***

# Content Stylings

- Weather
- Holidays
- Regional/national days of recognition
- Use of emoji's
- Use of excessive signature blocks/ quotes
- Disclaimers
- Lack of vocal cues
- How to engage in active listening

Written communications are *perceived* as being more concrete and well thought out. Both parties will make this same false assumption

# Email Closings

- Appropriate closing
  - Better response to “thanks”
  - Others: “Best,” “Sincerely,” “Yours truly,” “Here’s to your best day yet”
- Quotes
- Misdirect notices; other legal compliance



# Importance of the PS

- Marketing copywriters will tell you that of all the things in an email that get read, the “PS” is number one.
- Can be used for emphasizing important points
  - Deadlines
  - Next appointment
  - Approvals made or pending

# What Happens to Small Talk?

- Dealing with small talk:  
The personal message or personal opening; empathy balanced with assertiveness
- Interest in the person is good – build the relationship.
- Machiavellian use: “I know that you have some illness in your family right now, so let’s see if we can wrap this up and get it off your desk so you can give your family the attention they need.”

# Polling Question

Does the failure to obtain the necessary signature of approval on appropriate pieces of file documentation remove the authority of the Contracting Officer to act?

- A. Yes
- B. No
- C. It depends (note in questions box)

# *Examples and Conclusions*

## SECTION 5

# The Rule of 42

<https://www.iflscience.com/life-the-universe-and-everything-why-42-really-is-the-ultimate-answer-72379>

# 16.102 Policies.

(a) Contracts resulting from sealed bidding shall be firm-fixed-price contracts or fixed-price contracts with economic price adjustment.

(b) Contracts negotiated under part 15 may be of any type or combination of types that will promote the Government's interest, except as restricted in this part (see 10 U.S.C. 3321(a) and 41 U.S.C.3901). Contract types not described in this regulation shall not be used, except as a deviation under subpart 1.4.

(c) The cost-plus-a-percentage-of-cost system of contracting shall not be used (see 10 U.S.C. 3322(a) and 41 U.S.C.3905(a)). Prime contracts (including letter contracts) other than firm-fixed-price contracts shall, by an appropriate clause, prohibit cost-plus-a-percentage-of-cost subcontracts (see clauses prescribed in subpart 44.2 for cost-reimbursement contracts and subparts 16.2 and 16.4 for fixed-price contracts).

(d) No contract may be awarded before the execution of any determination and findings (D&F's) required by this part. Minimum requirements for the content of D&F's required by this part are specified in 1.704.

# 6.302-7 Public interest

(a) Authority.

(1) Citations: [10 U.S.C. 3204\(a\)\(7\)](#) or [41 U.S.C.3304\(a\)\(7\)](#).

(2) Full and open competition need not be provided for when the agency head determines that it is not in the public interest in the particular acquisition concerned.

(b) *Application*. This authority may be used when none of the other authorities in [6.302](#) apply.

(c) Limitations.

(1) A written determination to use this authority shall be made in accordance with [subpart 1.7](#), by-

(i) The Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, the Secretary of Homeland Security for the Coast Guard, or the Administrator of the National Aeronautics and Space Administration; or

(ii) The head of any other executive agency. This authority may not be delegated.

(2) The Congress shall be notified in writing of such determination not less than 30 days before award of the contract.

(3) If required by the head of the agency, the contracting officer shall prepare a justification to support the determination under paragraph (c)(1) of this subsection.

(4) This Determination and Finding (D&F) shall not be made on a class basis.

# Mind Reading

- Boards and Courts are called upon to determine what the parties intended when drafting and entering into the contract
- Somewhere along the way EITHER a party changed their mind OR there was a lack of full understanding by one or more parties at contract inception.
- Memories fade; people move to new jobs
- This requires the impossible task of reading minds. Nonetheless, boards and courts must make their rulings.



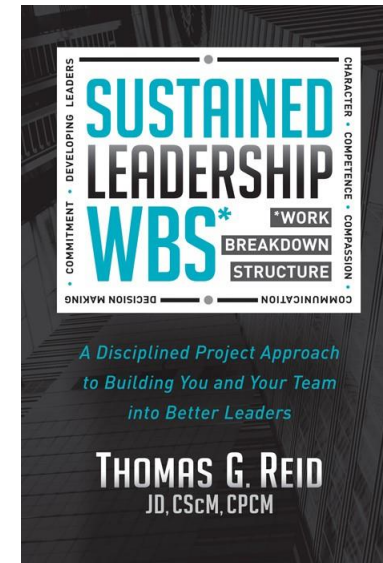




# PCI Instructor, Tom Reid

[www.certifiedKsolutions.com](http://www.certifiedKsolutions.com)

[www.TalkingHeadAcademy.Thinkific.com](http://www.TalkingHeadAcademy.Thinkific.com)  
(Free class there provides 1 CPE credit)



“The first responsibility of a leader is to define reality. The last is to say thank you.”

**Max DePre**  
*Author & Business Executive*

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