



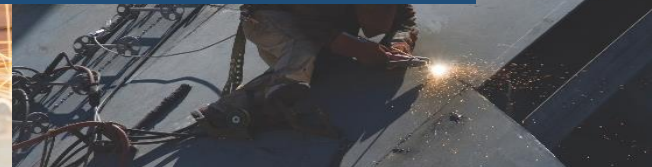
Wisconsin
Procurement
Institute

A Procurement Technical
Assistance Center (PTAC)

FLOW-DOWN CLAUSES – MANAGEMENT AND RESPONSIBILITIES FOR FEDERAL CONTRACTORS

ACQUISITION HOUR WEBINAR

November 1, 2017



WEBINAR ETIQUETTE

- Please
 - When logging into go-to-meeting, enter the name that you have registered with
 - Put your phone or computer on mute
 - Use the Chat option to ask your question(s): We will read them and our guest speaker will provide an answer to the group
- Thank you!

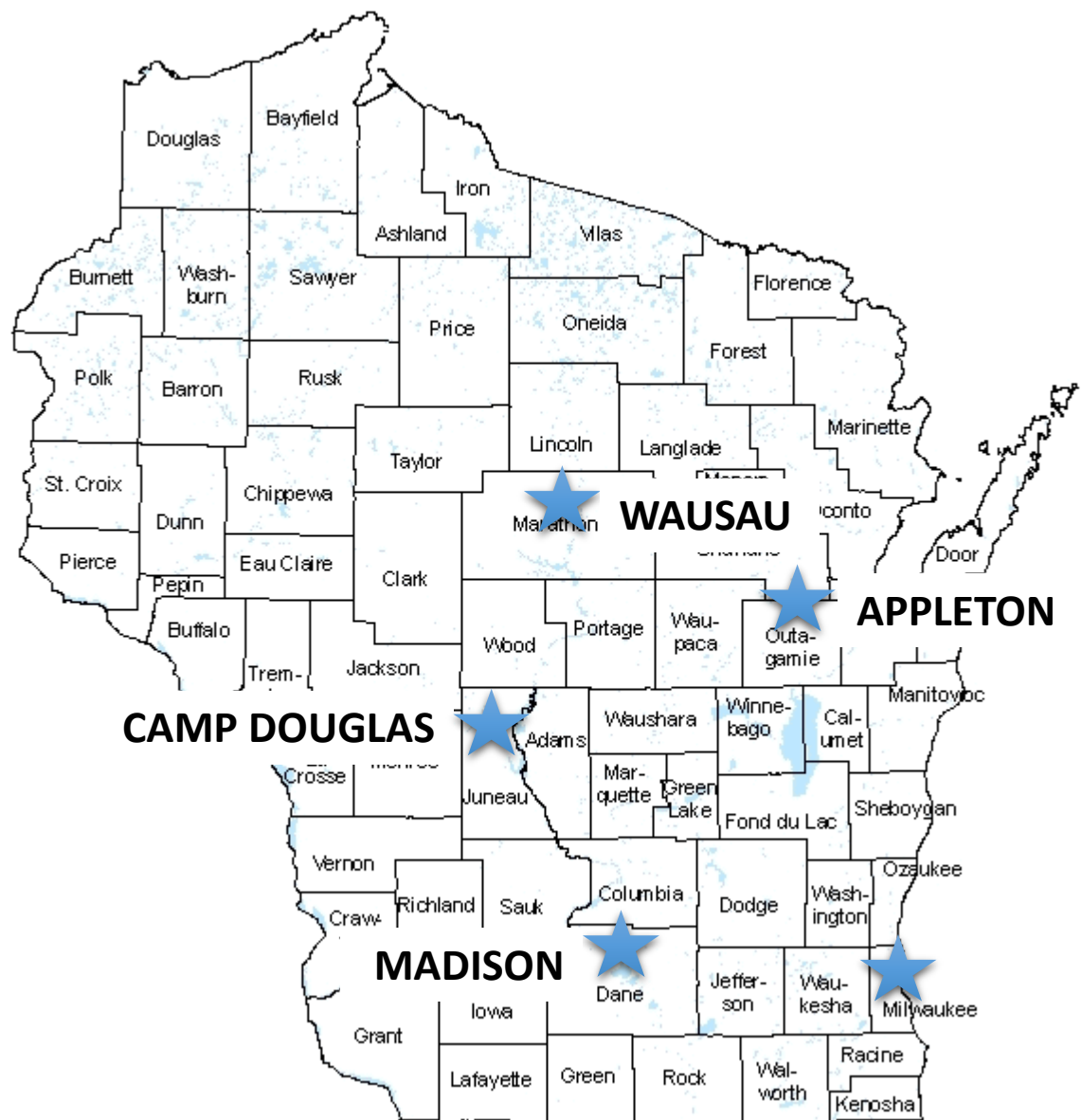
ABOUT WPI

SUPPORTING THE MISSION

Assist businesses in creating,
development and growing their sales,
revenue and jobs through Federal, state
and local government contracts.

WPI OFFICE LOCATIONS

- MILWAUKEE – *Technology Innovation Center*
- MADISON –
 - *Madison Enterprise Center*
 - *FEED Kitchens*
- CAMP DOUGLAS – *Juneau County Economic Development Corporation (JCEDC)*
- WAUSAU – *Wausau Region Chamber of Commerce*
- APPLETON – *Fox Valley Technical College*



WPI'S CURRENT NEWSLETTER

www.wispro.org

UPCOMING EVENTS

OCTOBER 3 2017

ACQUISITION HOUR: PROTESTS, CLAIMS AND
DISPUTES IN FEDERAL CONTRACTS

OCTOBER 4 2017

SELLING PRODUCTS AND SERVICES TO THE FEDERAL
GOVERNMENT - GETTING STARTED WITH A FOCUS ON
AIRCRAFT AND AEROSPACE SUPPLIERS - PART ONE
APPLETON, WI »

OCTOBER 4 2017

ACQUISITION HOUR: ESRS INDIVIDUAL
SUBCONTRACTOR REPORTING (ISR) BASICS

OCTOBER 11 2017

PRE-MARKETPLACE SERIES: MONEY, MARKETS AND
MARGINS (M3) - INCREASING YOUR PROFITABILITY,
NETWORKS AND NET WORTH
FITCHBURG »

OCTOBER 12 2017

PRE-MARKETPLACE SERIES: MONEY, MARKETS AND
MARGINS (M3) - INCREASING YOUR PROFITABILITY,
NETWORKS AND NET WORTH
BOWLER »



SERVICES OFFERED BY WPI

- FREE Bid Matching Services
- Individual Counseling and Assistance
- Locating Local, State and Federal Opportunities
- Government Market Strategy Development
- Training in use of Government websites and tools
- Assistance with System for Award Management (SAM) Registration
- Assisting in Market Research Process
- Development of Market Profile
- Small Business Subcontracting Plans Development, Outreach and Reporting
- Small Group Training
- Outreach and training with Local, State and Federal agencies
- Assist with Pre and Post Award Functions
- Assistance with Agency Specific Contracting Requirements
- Assistance with Contracting Regulations and Requirements, including FAR, DFAR, CFR
- Assistance with GSA Schedule Preparation and Administration
- Assistance with Local, State and Federal Certifications, including:
 - Service Disabled & Veteran Owned Small Business, HUBZone, Woman Owned Small Business, 8(a) Business Development Program
 - State
 - Local
 - DBE
- Bid review and Submission Assistance
- Proposal review and Submission Assistance
- Capabilities Statement and Related Government Marketing Material Development
- Assistance in Locating and Developing Teaming Partners and Subcontractors
- Updated Government Market Information

WHAT WE WILL COVER TODAY

- What are Flow Down Clauses
- How to Determine if a Clause Flows Down
- Method to Track Clauses
- Commercial Item Requirements
- Sample Subcontract Language

WHAT ARE FLOW DOWN CLAUSES

WHAT ARE FLOW DOWN CLAUSES?

FAR clauses included in Government contracts that prime contractors are required to flow down to their subcontractors in their subcontracts.

Agency supplemental regulations also include clauses with flow down requirements.

Flow Down Clauses can significantly impact the obligations and risk of performing a subcontract.

WHAT IS A SUBCONTRACT?

FAR 44.101

“Subcontract” means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract, including POs, and changes and mods to POs.

“Subcontractor” means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

HOW TO DETERMINE IF A CLAUSE FLOWS DOWN

HOW DO YOU KNOW WHAT CLAUSES FLOW DOWN

- The FAR clause itself usually states if the clause flows down.
- Flow down can be mandatory, non-mandatory (suggested), or to be consider.
- May need to flow down the entire clause or the substance of the clause.

WHY DO FLOW DOWNS MATTER?

For Prime Contractors:

- Responsible for the actions of their subcontractors. Prime Contractor is responsible for the entire contract.
- Manage/allocate performance uncertainties and risk.

WHY DO FLOW DOWNS MATTER?

For Subcontractors:

- Need to know how FAR requirements will impact their costs.
- May need to flow down FAR clauses as well to their subcontractors/suppliers.
- Minimize exposure to prime contractor risks.
- Ensure company can meet compliance obligations.

FLOW DOWN REQUIREMENTS

- Flow down requirements depend on subcontract type and dollar value.
- The entire prime contract should not be flowed down to the subcontractor.

DRAFTING FLOW DOWNS

- Some clauses must be flowed down verbatim
 - “Contractor shall include this clause”
 - “Contractor shall include the terms of this clause”
- Some clauses may be modified
 - “Contractor shall include the requirements of this clause”
 - “Contractor shall include the substance of this clause”

NON-MANDATORY FLOW DOWNS TO INCLUDE

- **Termination for Convenience Clause** (FAR 52.249-x) – Allows prime to terminate subcontract should the Government terminate the prime contract. If prime has no right to terminate subcontract could result in costly breach of contract.
- **Changes Clause** (FAR 52.243-x) – Allows prime to flow Government changes to the subcontractor. Prime must be able to modify subcontract unilaterally to match the scope of the Government change.
- **Disputes Clause** (FAR 52.233-1) – Puts subcontractor on notice of disputes process and requires subcontractor to keep working pending a dispute.

FAR CLAUSE DATES

- The Prime Contractor needs to flow down the version of the clause that is in their contract.
- If the FAR is updated between the award of the prime contract and the signing of subcontracts, the original contract clause is flowed down.

METHOD TO TRACK CLAUSES

STEPS AFTER RECEIPT OF CONTRACT AWARD

- Generate a file, either paper or electronic of the full text of all clauses listed in the contract.
- Look up each clause to determine if it flows down to the subcontractor. Note if any thresholds apply.
- Prepare contracts with subcontractors including all flow-down clauses.

STEPS AFTER RECEIPT OF CONTRACT AWARD

- Use Excel to set up a list of all clauses, include effective date of the clause and if an alternate was included.
- Indicate if reports are required.
- If you have multiple government contracts, maintain a master list of all clauses.

CLAUSE #	TITLE	THRESHOLD	CLAUSE/ PROVISION	REFERENCE/ FULL TEXT	FLOW DOWN	WHEN TO USE			
52.202-1	Definitions (NOV 2013)	over SAT	C	R	C				
52.203-3	Gratuities (APR 1984)	over SAT	C	R	C				
52.203-5	Covenant Against Contingent Fees (MAY 2014)	over SAT	C	R	C				
52.203-6	Restrictions on Subcontractor Sales to the Government (SEP 2013)	over SAT	C	R	M	commercial items over the SAT			
52.203-7	Anti-Kickback Procedures (MAY 2014)	over SAT	C	R	M	Over SAT			
52.203-8	Cancellation, Rescission and Recovery of Funds for Illegal or Improper Activity (MAY 2014)	over SAT	C	R	None				
52.203-10	Price or Fee Adjustment for Illegal or Improper Activity (MAY 2014)	over SAT	C	R	None				
52.203-12	Limitation on Payments to Influence Certain Federal Transactions (MAY 2014)	over \$150K	C	R	M	Over SAT			
52.203-13	Contractor Code of Business Ethics and Conduct (APR 2014)	over \$5 M	C	R	M	Over \$5M	period of performance 120 day		
52.203-14	Display of Hotline Poster(s) (DEC 2007)	over \$5 M	C	R	M	Over \$5M	CO fill in		
52.203-15	Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (MAY 2014)	all over SAT	C	R	M	All	when funded in whole or in part		
52.203-16	Preventing Personal Conflicts of Interest (DEC 2011)	over SAT	C	R	M	Over SAT	sol. includ self-employed individuals		
52.203-17	Contractor Employee Whistleblower Rights and Requirements (DEC 2011)	all over SAT	C	R	M	Over SAT			
52.204-4	Printed or Copied Double-Sided on Postconsumer Fiber Based Paper (JUL 2013)	over SAT	C	R	None				
52.204-7	System for Award Management (JUL 2013)	ALL	P	R	M	All			
52.204-8	Annual Representations and Certifications (DEC 2014)	all over SAT	P	F	None				
52.204-9	Personal Identity Verification of Contractor Personnel (JAN 2014)	All	C	R	M	Access to	when routine access to a federal information system		
52.204-10	Reporting Executive Compensation and First-Tier Subcontractor Compensation (JUL 2013)	over \$25K	C	R	None				
52.204-13	System for Award Management Maintenance (JUL 2013)	All	C	R	M	All	When 52.204-7 is included		
52.204-14	Service Contract Reporting Requirements (JAN 2014)		C	R	M	All	Over thresholds outlined in FAR 101.11.6		
52.204-15	Service Contract Reporting Requirements for Indefinite-Delivery Contract (JAN 2014)		C	R	M	All	Over thresholds outlined in FAR 101.11.6		
52.204-16	Commercial and Government Entity Code Reporting (NOV 2014)	All	P	R	None				
52.204-17	Ownership or Control of Offeror (NOV 2014)	All	P	R	None				
52.204-18	Commercial and Government Entity Code Maintenance (NOV 2014)		C	R	None		when 52.204-16 is included		
52.204-19	Incorporation by Reference of Representations and Certifications (JUL 2013)	All	C	R	None				
52.209-5	Representation by Corporations Regarding an Unpaid Tax Liability (JUL 2013)	Over SAT	P	F	None				

COMMERCIAL ITEM REQUIREMENTS

COMMERCIAL ITEM REQUIREMENTS

FAR 52.244-6 Subcontracts for Commercial Items states the contractor shall insert the following 20 clauses in contracts for commercial items.

- 52.203-13 Contractor Code of Business Ethics and Conduct
- 52.203-15 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009
- 52.203-19 Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements

COMMERCIAL ITEM REQUIREMENTS

- 52.204-21 Basic Safeguarding of Covered Contractor Information Systems
- 52.219-8 Utilization of Small Business Concerns
- 52.222-21 Prohibition of Segregated Facilities
- 52.222-26 Equal Opportunity
- 52.222-35 Equal Opportunity for Veterans
- 52.222-36 Equal Opportunity for Workers with Disabilities

COMMERCIAL ITEM REQUIREMENTS

- 52.222-37 Employment Reports on Veterans
- 52.222-40 Notification of Employee Rights Under the National Labor Relations Act
- 52.222-50 Combating Trafficking in Persons
- 52.222-55 Minimum Wages under Executive Order
- 52.222-59 Compliance with Labor Laws (Executive Order 13673)
- 52.222-60 Paycheck Transparency (Executive Order 13673)

COMMERCIAL ITEM REQUIREMENTS

- 52.222-62 Paid Sick Leave Under Executive Order 13706
- 52.224-3 Privacy Training
- 52.225-26 Contractors Performing Private Security Functions Outside the United States
- 52.232-40 Providing Accelerated Payments to Small Business Subcontractors
- 52.247-64 Preference for Privately Owned U.S.-Flag Commercial Vessels

SAMPLE SUBCONTRACT LANGUAGE

SAMPLE SUBCONTRACT LANGUAGE

INCORPORATION OF FAR CLAUSES.

The Federal Acquisition Regulation (FAR) clauses referenced below are incorporated herein by reference, with the same force and effect as if they were given in full text, and are applicable, including any notes following the clause citation, during the performance of this Contract. If the date or substance of any of the clauses listed below is different than the date or substance of the clause actually incorporated in the Prime Contract referenced by number herein, the date or substance of the clause incorporated by said Prime Contract shall apply instead.

SAMPLE SUBCONTRACT LANGUAGE

GOVERNMENT SUBCONTRACT.

This Contract is entered into by the Parties in support of a U.S. Government Contract.

Definitions as used in the FAR clauses referenced below and otherwise in this Contract:

1. "CONTRACTOR" means the SELLER, as defined in the definitions of this document, acting as the immediate (first-tier) subcontractor to ABC COMPANY.
2. "Prime Contract" means the contract between ABC COMPANY and the U.S. Government or between ABC COMPANY and its higher-tier contractor who has a contract with the U.S. Government.

SAMPLE SUBCONTRACT LANGUAGE

3. "Contract" means this Contract.
4. "Subcontract" means any contract placed by the CONTRACTOR or lower-tier subcontractors under this Contract.

NOTES.

1. Substitute "ABC COMPANY" for "Government" or "United States" as applicable throughout this clause.
2. Substitute "ABC COMPANY Procurement Representative" for "Contracting Officer", "Administrative Contracting Officer", and "ACO" throughout this clause.

SAMPLE SUBCONTRACT LANGUAGE

3. Insert “and ABC COMPANY” after “Government” or “Contracting Officer”, as appropriate, throughout this clause.
4. Insert “or ABC COMPANY” after “Government” throughout this clause.
5. Communication/notification required under this clause from/to the CONTRACTOR to/from the Contracting Officer shall be through ABC COMPANY.
6. “Contracting Officer” shall mean the U.S. Government Contracting Officer for ABC COMPANY’s government prime contract under which this Contract is entered.

SAMPLE SUBCONTRACT LANGUAGE

AMENDMENTS REQUIRED BY PRIME CONTRACT.

CONTRACTOR agrees that upon the request of ABC COMPANY it will negotiate in good faith with ABC COMPANY relative to amendments to this Contract to incorporate additional provisions herein or to change provisions hereof, as ABC COMPANY may reasonably deem necessary in order to comply with the provisions of the applicable prime contract or with the provisions of amendments to such prime contract. If any such amendment to this Contract causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the Work under this Contract, an equitable adjustment shall be made pursuant to the "Changes" clause of this Contract.

SAMPLE SUBCONTRACT LANGUAGE

FAR FLOWDOWN CLAUSES.

REFERENCE TITLE

1. The following FAR clauses apply to this Contract :
2. The following FAR clauses apply to this Contract if the value of this Contract equals or exceeds \$10,000:
3. The following FAR clauses apply to this Contract if the value of this Contract equals or exceeds \$25,000:
4. The following FAR clauses apply to this Contract if the value of this Contract equals or exceeds \$150,000:

SAMPLE SUBCONTRACT LANGUAGE

- 52.225-9 BUY AMERICAN ACT – CONSTRUCTION MATERIALS (MAY 2014)
- 52.225-13 RESTRICTIONS ON CERTAIN FOREIGN PURCHASES (JUNE 2008) (In paragraph (a), see Notes 5 and 6.)
- 52.234-1 INDUSTRIAL RESOURCES DEVELOPED UNDER DEFENSE PRODUCTION ACT TITLE III (DEC 1994). (See Note 2.)
- 52.242-13 BANKRUPTCY (JUL 1995) (See Note 2.)
- 52.242-15 STOP-WORK ORDER (AUG 1989) (See Notes 1 and 2.)

SUBSTANCE OF FAR CLAUSE INCLUDED

GRATUITIES/KICKBACKS

(a) No gratuities (in the form of entertainment, gifts or otherwise) or kickbacks shall be offered or given by SELLER, to any employee of ABC COMPANY with a view toward securing favorable treatment as a supplier.

(b) By accepting this Contract, SELLER certifies and represents that it has not made or solicited and will not make or solicit kickbacks in violation of FAR 52.203-7 or the Anti-Kickback Act of 1986 (41 USC 51-58), both of which are incorporated herein by this specific reference, except that paragraph (c)(1) of FAR 52.203-7 shall not apply.

RESOURCES

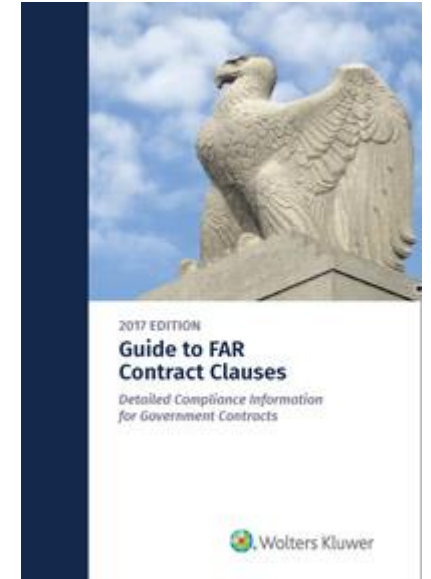
AVAILABLE REFERENCE BOOK

Guide to FAR Contract Clauses: Detailed Compliance Information for Government Contracts, 2017 Edition

By Wolters Kluwer Law & Business

Current cost \$279.00

<https://lrus.wolterskluwer.com/store/product/guide-to-far-contract-clauses-detailed-compliance-information-for-government-contracts-2017-edition/>



RESOURCES:

- FAR: <https://www.acquisition.gov/?q=browsefar>
- Air Force FAR: <http://farsite.hill.af.mil/>
- Acquisition.gov is: <https://www.acquisition.gov/>
- Wisconsin Procurement Institute
Phone: 414-270-3600 www.wispro.org

UPCOMING TRAINING - EVENTS

ACQUISITION HOUR LIVE WEBINAR SERIES

- November 7, 2017 – **The Contractor Purchasing System Review (CPSR) Series part 3 of 4** – [CLICK HERE](#) for additional information – presented by Phil Bail, Phil Bail and Associates
- November 8, 2017 – **Cyber Security for Current and Prospective DOD Contractors and Subcontractors** – [CLICK HERE](#) for additional information – presented by Marc Violante – Wisconsin Procurement Institute (WPI)
- November 14, 2017 – **The Contractor Purchasing System Review (CPSR) Series part 4 of 4** – [CLICK HERE](#) for additional information – presented by Phil Bail, Phil Bail and Associates
- November 15, 2017 – **Compliance with NEW DOD Regulations on Safeguarding Covered Defense Information – a Legal Perspective** – [CLICK HERE](#) for additional information
- November 28, 2017 – **The HUBZone Program – Certification Benefits and New Regulations** – [CLICK HERE](#) for additional information – presented by Shane Mahaffy, Lead Business Opportunity Specialist, US.Small Business Administration (SBA)
- November 29, 2017 – **Overview of CPARS** – [CLICK HERE](#) for additional information – presented by Carol Murphy – Wisconsin Procurement Institute (WPI)

ACQUISITION HOUR LIVE WEBINAR SERIES

- November 29, 2017 – **Cyber Security and Technology** – [CLICK HERE](#) for additional information – presented by George Chavez
- December 5, 2017 – **The SBA 8(a) Certification Program** – [CLICK HERE](#) for additional information – presented by Shane Mahaffy, Lead Business Opportunity Specialist, US.Small Business Administration (SBA)
- December 6, 2017 – **Cyber Security for Current and Prospective DOD Contractors and Subcontractors** – [CLICK HERE](#) for additional information – presented by Marc Violante – Wisconsin Procurement Institute (WPI)
- December 12, 2017 – **Intellectual Property for Government Contractors and Subcontractors** – [CLICK HERE](#) for additional information – presented by Laura J. Grebe, Attorney, Husch Blackwell LLP

UPCOMING EVENTS

Selling Products and Services to Department of Defense Prime Contractors – Getting Started with a Focus on Aircraft and Aerospace Suppliers – Part Two –
November 2, 2017 – Appleton, WI

Learning New Roles Additive Manufacturing is Impacting the Aerospace Sector –
November 15, 2017 - Appleton, WI

UPCOMING EVENTS

Pre-Marketplace Series: Money, Markets and Margins (M3) – Increasing Your Profitability, Networks and Net Worth

November 14, 2017 – Waukesha, WI

November 15, 2017 – Racine, WI

November 16, 2017 – Ashland, WI

November 30, 2017 – Wauwatosa, WI

December 6, 2017 – Green Bay, WI

UPCOMING EVENTS



MARKETPLACE 2017 – Governor’s Conference on Minority Business Development – December 13 – 14, 2017 – Milwaukee, WI



QUESTIONS?

SURVEY



CONTINUING PROFESSIONAL EDUCATION



CPE Certificate available, please contact:

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benjaminb@wispro.org

PRESENTED BY

Wisconsin Procurement Institute (WPI)

www.wispro.org

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Company

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