



A Procurement Technical
Assistance Center (PTAC)

A photograph of the Wisconsin State Capitol building at dusk. The building is illuminated with warm lights, and its large green dome is a prominent feature. The sky is a deep blue, and trees with autumn foliage are visible in the foreground.

ACQUISITION HOUR: PROTESTS, CLAIMS AND DISPUTES IN FEDERAL CONTRACTS

October 3, 2017



WEBINAR ETIQUETTE

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 - When logging into go-to-meeting, enter the name that you have registered with
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 - 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!

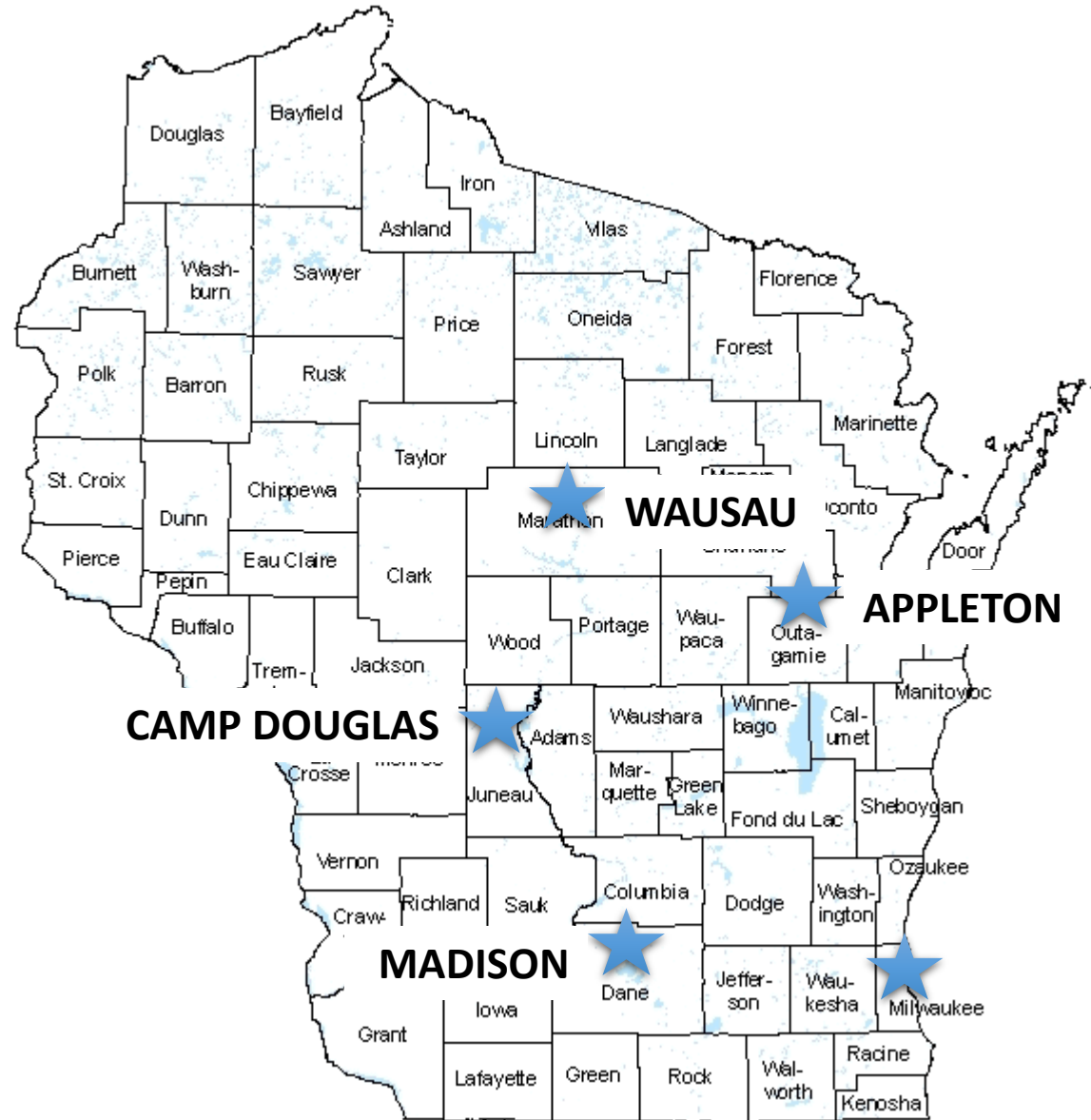
ABOUT WPI

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*



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www.wispro.org

UPCOMING EVENTS

AUGUST 16 2017

ACQUISITION HOUR: CYBER SECURITY FOR CURRENT AND PROSPECTIVE DOD CONTRACTORS AND SUBCONTRACTORS

AUGUST 17 2017

ACQUISITION HOUR - THE END OF THE FISCAL YEAR IS HERE: WHAT IS HOT AND WHAT IS NOT

SEPTEMBER 19 2017

ACQUISITION HOUR: SELLING TO THE STATE OF WISCONSIN AND LOCAL GOVERNMENTS

SEPTEMBER 20 2017

ACQUISITION HOUR: OVERVIEW OF THE FEDERAL ACQUISITION REGULATIONS (FAR)

OCTOBER 4 2017

ACQUISITION HOUR: ESRs INDIVIDUAL SUBCONTRACTOR REPORTING (ISR) BASICS

CURRENT OPPORTUNITIES (5)

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

ACQUISITION HOUR: PROTESTS, CLAIMS AND DISPUTES IN FEDERAL CONTRACTS

Presented by:

Attorney Emily Constantine

October 3, 2017

Bid Protest Statistics for Fiscal Years 2012-2016

	FY2016	FY2015	FY2014	FY2013	FY2012
Cases Filed ¹	2789 (up 6% ²)	2639 (up 3%)	2561 (up 5%)	2429 (down 2%)	2,475 (up 5%)
Cases Closed ³	2734	2647	2458	2538	2495
Merit (Sustain + Deny) Decisions	616	587	556	509	570
Number of Sustains	139	68	72	87	106
Sustain Rate	22.56%	12%	13%	17%	18.6%
Effectiveness Rate ⁴	46%	45%	43%	43%	42%
ADR ⁵ (cases used)	69	103	96	145	106
ADR Success Rate ⁶	84%	70%	83%	86%	80%
Hearings ⁷	2.51% (27 cases)	3.10% (31 cases)	4.70% (42 cases)	3.36% (31 cases)	6.17% (56 cases)

FAR Part 33

- Part 33. Protests, Disputes, and Appeals
 - Subpart 33.1 – Protests
 - Timeliness
 - Protest requirements
 - Form of protests
 - Subpart 33.2 – Disputes and Appeals
 - Dispute
 - Claim
 - Requirements
 - Contracting Officer Final Decision
 - Appeal: Board of Contract Appeals or Court of Federal Claims

PROTESTS

- To Protest or Not to Protest
 - Business considerations
 - Incumbent or not
 - Future business
 - Relationship with procuring agency
 - Ability to “stay” the award
 - Grounds for Protest
 - Investment: Time and Cost

PROTESTS

- To Protest or Not to Protest (cont.)
 - Legal considerations
 - Grounds for protest
 - Likelihood of success (What constitutes success?)
 - In line for award

PROTESTS

- Grounds for Protest
 - Solicitation defects
 - Failure to obtain competition (restrictive specifications)
 - Failure to comply with law, rule or regulation
 - Failure to follow evaluation criteria
 - Improper past performance evaluation (uneven consideration of past performance information)

PROTESTS

- Grounds for Protest (cont.)
 - Failure to perform price/technical trade-off
 - Unbalanced bids/price reasonableness
 - Knowledge of noncompliance of competitor's product
 - Improper responsibility determination
 - Failure to hold discussions with all offerors
 - Bait and switch

PROTESTS

- Grounds for Protest (cont.)
 - Inadequate market research regarding basis for a set-aside
 - Lack of competition for IDIQ contract holders
 - Failing to provide material information to all offerors
 - Flawed technical evaluation
 - Unequal treatment

PROTESTS

- Assessing Likelihood of Success
 - Notice of Award
 - Comparison of price with awardee's
 - Debriefing
 - FOIA

PROTESTS

- Timing of Protest
 - Automatic Stay
 - Within 10 days of award (Agency must receive notice)
 - Within 5 days of a required debriefing
 - Protest Timeliness
 - Solicitation defects – Prior to bid/proposal due date
 - Other than solicitation defects: Within 10 days of when offeror knew or should have known
 - Post award – Generally within 10 days of award or debriefing

PROTESTS

- Protest Pitfalls
 - Timeliness
 - Basis for Protest
 - Copy to Contracting Officer
 - Failure to demonstrate eligibility for award
 - Late response to Agency Report
 - Grounds for Supplemental Protest
 - Request for fees/costs

PROTESTS

- Filing the Protest
 - Content
 - GAO
 - Copy to CO
- Protest Process
 - Protest
 - Agency Report
 - Comments on Agency Report
 - Supplemental Protest
- GAO Decision

Non-GAO Protests

- Court of Federal Claims
- Agency-level protests (FAR 33.103)
- SBA protests
 - US Small Business Administration has exclusive jurisdiction over certain matters
 - SBA protests are subject to their own procedural requirements and time frames
 - Size protests filed with the contracting officer, who forwards the protest to SBA Government Contracting Area Office
 - Latvian Connection, LLC, SBA No. SIZ-5734 (April 27, 2016)

Government Contracts-Claims

- What is a Claim?
 - “Claim” means 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 contract terms, or other relief arising under or relating to the contract. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under 41 U.S.C. chapter 71, Contract Disputes, until certified as required by the statute. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time. (FAR 2.101)
- Request for a final decision

Claims

- Certification of Claim.
 - Monetary claims in excess of \$100,000 must be certified
 - Claim made in good faith.
 - Supporting data is accurate and complete.
 - Person submitting the claim is authorized to do so
 - Claim can be rejected if not properly certified.
- False Claims Act.
 - Potential criminal liability.
 - “Qui tem action.” Third party can bring claim on behalf of government and share in recovery.

Subcontractor Claims

- Subcontractor claims.
 - Must be brought by prime contractor (“Sponsored claims”).
 - FAR 44.203(c) permits indirect subcontractor appeals
 - Generally permitted only if the contractor could make a claim against the government based on the subcontractor’s recovery or charge the cost of the subcontractor’s claim to the government contract
 - Potential conflict between the position taken by prime contractor and subcontractor.
 - Ability of a subcontractor to pursue indirect claims is subject to a number of exceptions

QUESTIONS

ACQUISITION HOUR LIVE WEBINAR SERIES

- October 4, 2017 – **eSRS Individual Subcontractor Reporting (ISR) Basics** – [CLICK HERE](#) for additional information – presented by Kim Garber, Wisconsin Procurement Institute (WPI)
- October 17, 2017 – **Packaging Shipping and Invoicing Using WAWF I-RAPT** – [CLICK HERE](#) for additional information – presented by Pat Hotton, Bentley World Packaging Ltd. & Ben Blanc, Wisconsin Procurement Institute (WPI)
- October 18, 2017 – **Cyber Security for Current and Prospective DOD Contractors and Subcontractors** – [CLICK HERE](#) for additional information – presented by Marc Violante – Wisconsin Procurement Institute (WPI)
- October 24, 2017 – **The Contractor Purchasing System Review (CPSR) Series part 1 of 4** – [CLICK HERE](#) for additional information – presented by Phil Bail, Phil Bail and Associates
- October 31, 2017 – **The Contractor Purchasing System Review (CPSR) Series part 2 of 4** – [CLICK HERE](#) for additional information – presented by Phil Bail, Phil Bail and Associates

ACQUISITION HOUR LIVE WEBINAR SERIES

- November 1, 2017 – **Flow-down Clauses – Management and Responsibilities for Federal Contractors** – [CLICK HERE](#) for additional information – presented by Carol Murphy – Wisconsin Procurement Institute (WPI)
- 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 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)

MARKETPLACE 2017

Save the date: December 13 – 14

PRE-MARKETPLACE Series presented by WPI
<https://premarketplacewi.org/>



QUESTIONS?

SURVEY



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