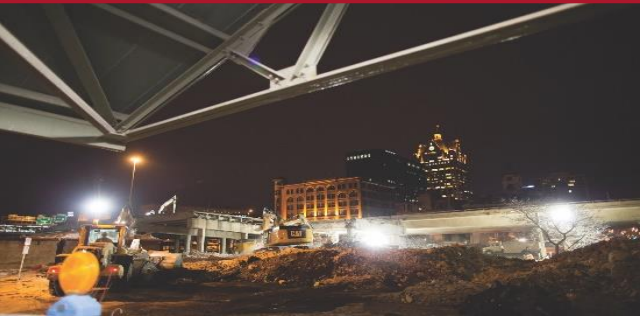


CHANGES, DELAYS AND DISPUTES IN FEDERAL CONSTRUCTION CONTRACTS

Acquisition Hour Webinar

November 17, 2020



WEBINAR ETIQUETTE

PLEASE

- Log into the GoToWebinar session with the name that you registered with online
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- Use the QUESTIONS option to ask your question(s).
 - We will share the questions with our guest speaker who will respond to the group

THANK YOU!

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**Celebrating 32 Years of
serving Wisconsin Business!**



Assist businesses in creating, developing and growing their sales, revenue and jobs through Federal, State and Local Government contracts.

- **INDIVIDUAL COUNSELING** – At our offices, at client’s facility or via telephone/GoToWebinar
- **SMALL GROUP TRAINING** – Workshops and webinars
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Last year WPI provided training at over 100 events and provided service to over 1,200 companies

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- *Dane County Latino Chamber of Commerce*
- *Wisconsin Manufacturing Extension Partnership (WMEP)*
- *Madison Area Technical College (MATC)*

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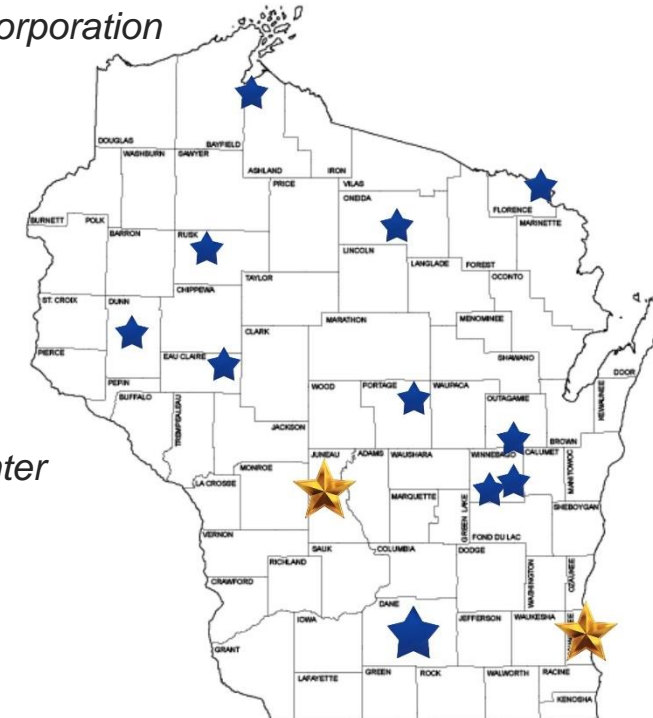
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UPCOMING EVENTS

- WED 21** Acquisition Hour: Government Property Management for Federal Contractors and Subcontractors
August 21 @ 12:00 pm - 1:00 pm
- THU 22** Advancing Cybersecurity in the Industry, Energy, Water Nexus – Oshkosh, WI
August 22 @ 9:00 am - 3:00 pm
Oshkosh WI
- THU 22** NDIA Great Lakes Chapter 10th Anniversary – Milwaukee, WI
August 22 @ 12:30 pm - 7:30 pm
Brookfield Wisconsin
- SEP 11** Acquisition Hour: The End of the Fiscal Year is Here – What is Hot and What is Not
September 11 @ 12:00 pm - 1:00 pm

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CURRENT OPPORTUNITIES (1)

GET STARTED WITH THE BASICS

Questions & answers on how to get started.

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Stay up-to-date with the latest WPI news.

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HAVE A QUESTION? WE'RE HERE TO HELP.

One of our staff of experts is available to answer your questions.

[GET HELP](#)

WHAT WE WILL COVER TODAY

- Directed and Constructive Changes
- Excusable and Non-Excusable Delays
- Procedures for Resolving Disputes

Note: Our focus will be on post-award issues that may arise during performance of firm fixed price construction contracts.

CHANGES

FAR 52.243-4 CHANGES CLAUSE

This clause is often found in federal firm fixed price construction contracts over the simplified acquisition threshold (SAT). For most agencies the SAT is currently \$250,000.

- Authorizes the Contracting Officer (CO) to issue written post-award changes.
- Provides that any written or oral direction, instruction, interpretation, or determination that modifies the original contract shall be treated as a change.
- Specifies the circumstances under which equitable monetary adjustments will be allowable for changes.

CHANGES

The Contracting Officer may find it easier to approve changes within a 10% increase- depending on how the initial budget was set

- Contracting officer's will sometimes say changes are delayed because there are different "colors of money."
- The Contracting Officer can approve certain changes but other times they may need to obtain approval or funding from others
- If a Contracting Officer's final decision is appealed the government might be able to access the judgement fund for changes.

COMMON REASONS FOR POST AWARD CHANGES

- User Changes
- Changes in Standards or Codes
- Differing Site Conditions
- Value Engineering Proposals
- Defective Specifications

DIRECTED CHANGES

Directed Changes are written modifications to the contract.

- **Change Order-** written order signed by the CO directing the Contractor to make a change without the Contractor's consent. When issued in FFP Construction Contracts, the Contractor must continue performance of the contract as changed. It is also called "unilateral change order" setting the stage for future negotiation.
- **Supplemental Agreements-** a written contract modification that is accomplished by mutual action of the parties.

CONSTRUCTIVE CHANGES

Constructive Changes are informally ordered or caused by the Government. They may arise out of :

- CO's misinterpretation of the contract
- Defective Specifications that cause additional work
- Acceleration
- Hindrance or failure to cooperate
- Non-disclosure of vital information

CONSTRUCTIVE CHANGE- NOTICE REQUIREMENTS

The Contractor should promptly give the CO written notice of any Constructive Change

- The notice should:
 - Specify the date the change occurred
 - Specify what the change was
 - Specify how the CO ordered the change through word or deed
 - Clearly state that the Contractor considers the order a constructive change.
- No adjustment will be allowed for costs incurred more than 20 days before the notice is received
- Notice is not required if the constructive change arose out of defective specifications.

CHANGES – PRACTICE TIPS

- Read the changes clauses in the contract. Know what is required of you and when. (Oftentimes federal agencies have their own supplemental clauses on changes.)
- When change proposals are requested – submit them promptly. Make sure the proposal is complete. Provide an itemized breakdown that includes materials, quantities, unit prices, labor costs, and equipment. Ensure that all costs, overhead, and profit are accounted for.
- Track all RFIs and meeting minutes and emails, and any item that could be used as a basis for future change orders. A register of emails, RFIs and meeting minutes is highly recommended. A professional caretaker may be needed to manage and disseminate the register in a timely manner for a larger project.

CHANGES – PRACTICE TIPS

- Negotiate Supplemental Agreements with the Government as early as possible.
- Send RFIs as soon as the issues become evident or recognized.
- Read and make sure that you understand any release language contained in the Supplemental Agreements.
 - Make sure you fully understand exactly who is being released in the release language.
- Identify any Constructive Changes promptly and provide the Contracting Officer with proper notice.

DELAYS

DELAYS

- Non Excusable
- Excusable
 - Compensable
 - Suspension of Work Clause
 - Changes Clause
 - Non-compensable

NON EXCUSABLE DELAYS

Delays that the Contractor causes or that are in the Contractor's control

- The Contractor bears its own costs due to the delay and the Government has contractual remedies.
 - Actual damages
 - Liquidated damages
 - Possibly termination for default
 - Paying excess costs for completion by another Contractor.
- The Prime Contractor is responsible for Subcontractor caused delays

EXCUSABLE DELAY

Delay is excusable when it is beyond the control and without the fault or negligence of the Contractor

- The Contractor is entitled to a time extension for excusable delays
- The Contractor should give the CO prompt written notice of the excusable delay (within 10 days)

EXAMPLES OF EXCUSABLE DELAY

- Acts of God
- Fires
- Acts of the Public Enemy
- Floods
- Unusually severe weather
- Strikes
- Epidemics
- Freight Embargos
- Acts of the Government
- Acts of another onsite Gov't Contractor

Key: Red – might get time but not compensation Green- might get both time and compensation

REQUESTING RELIEF FOR EXCUSABLE DELAY

Contractor's request should show documentation that:

- That completion of the overall job/work was delayed
- The amount of time the overall completion was delayed
- What caused the delay
- That the cause was excusable
- The cost impact of the delay (if the delay is compensable)

REQUESTING RELIEF FOR EXCUSABLE DELAY

The Schedule is KEY!

- Know what the contract says about schedule submission, schedule updates, and delay
 - Understand the notice requirements for delays
 - Understand the mitigation requirements for delay and delay costs
- Get the baseline schedule approved early
 - Critical Path vs. Bar Chart
- Timely, accurate, contemporaneous monthly schedule updates are extremely important

TYPES OF EXCUSABLE DELAY

Non-compensable Excusable Delay – Contractor may be entitled to additional time for such delays but must bear the cost impact of such delays

Compensable Excusable Delay – Contractor may be entitled to both additional time and additional costs for delays that are solely caused by the Government

COMPENSABLE DELAY - SUSPENSION OF WORK

FAR 52.242-14

- If the CO suspends, delays, or interrupts the Contractor for an unreasonable period of time, an adjustment shall be made for the increased cost of performance (excluding profit) caused by the unreasonable delay.
- A compensable delay can result from the CO issuing a formal written suspension order (a directed suspension) or from the CO's act or failure to act (a constructive suspension).
 - However, a claim for constructive suspension cannot be allowed for costs incurred more than 20 days before the Contractor provided the CO with written notice of the act or failure to act

COMPENSABLE DELAY - FAR CHANGES CLAUSE

FAR 52.243-4

- Delays preceding a change are not recoverable under the standard FAR changes clauses.
- However an equitable adjustment under the changes clause could include impact costs that result from the change after its issuance.
- Under the equitable adjustment provision in the standard FAR changes clause you are entitled to reasonable costs and profit.

COMPENSABLE DELAY –COMMON TYPES OF ALLOWABLE COSTS

- **Unabsorbed Overhead – home office overhead**
 - Rarely allowed – Only when the Contractor is on standby (i.e. when the Contractor is required to resume work immediately upon Government notice)
- **Idle Labor and Equipment**
- **Escalation of Labor Rates and Material Prices**
 - Consider using RS Means for calculating yearly cost increases. A 3% annualized rate can be used to adjust for the rate of inflation. If construction is pushed to Winter, make sure to include resulting extra costs.
- **Loss of Efficiency**

NOTE: Contractor must make reasonable efforts to mitigate damages

MORE THAN 1 TYPE OF DELAY?

- When non-excusable delay is concurrent with compensable excusable delay -the Contractor is not entitled to additional time or money
- When non-compensable excusable delay is concurrent with compensable excusable delay- the Contractor may be entitled to additional time but not additional money.

DELAYS - PRACTICE TIPS

- Know and understand your contract clauses on Schedules, Changes, and Suspensions of Work.
- Maintain accurate monthly schedule updates. Discuss all possible delay issues with the Government early.
- Always take reasonable steps to mitigate delays and mitigate any delay damages
- Keep detailed records. The Government often audits delay claims.

RESOLVING DISPUTES

RESOLVE DISPUTES EARLY!

- Resolving disputes early is less costly for both Contractors and the Government.
- First, submit a detailed fully supported Request for Equitable Adjustment (REA).
 - Explain in detail the relevant facts. If compensable delay is claimed, include your time impact analysis based upon contemporary schedules.
 - Explain the contract provisions, clauses and/or other legal authority you are relying upon.
 - Provide detailed cost breakdowns with the invoices and receipts on the actual costs incurred.
 - A good accounting system that will be able to extract all project related direct and indirect cost is a “must have”. Construction project cost accounting systems such as “ComputerEase” can treat each project as a separate cost center. All project related costs and committed costs have to be uploaded weekly.

USE ADR

- Use Alternate Dispute Resolution or Mediation
 - Less costly and time consuming than litigation
 - Oftentimes resolution occurs quickly
 - You maintain control over the process
 - Resolution possibilities are extensive
 - Less formal venue so it is easier to present your positions

FILING A CLAIM – LAST RESORT

- A Claim is a written demand to the Contracting Officer seeking the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising out of the contract.
- Monetary Claims exceeding \$100,000 should be certified.
- Use the certification language found in FAR clause 52.233-1(d)(2)(iii).

FILING A CLAIM- LAST RESORT

- In the claim, clearly request a Contracting Officer's Final Decision (COFD) on the matter.
- Reference and/or attach all relevant information that supports your demand, including the detailed REAs previously submitted.
 - Include time impact analysis, estimates, invoices, receipts, emails, cell phone texts, and other correspondence
- When you get the COFD, read it carefully. If you still disagree with the government, you have the right to appeal the decision as specified.

APPEALING A CLAIM

- Can appeal decision to appropriate Board of Contract Appeals
- Can appeal to the US Court of Federal Claims
- If appealed , parties can still mutually agree to Alternate Dispute Resolution (ex. in from of retired Federal Court Judge)

CONSEQUENCES OF LITIGATION

1. Long time (typically a 2-year process)
2. Burden of Documentation
3. Federal lawyers unwilling to lose the case
4. Large legal bills from Lawyers that specialize in federal contracting

RESOURCES

RESOURCES

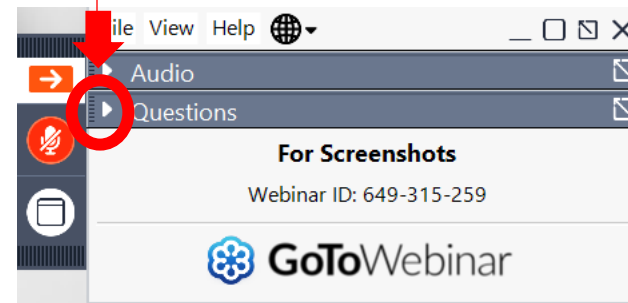
- FAR: <https://www.acquisition.gov/?q=browsefar>
- Beta.sam.gov: <https://beta.sam.gov/>
- Wisconsin Procurement Institute
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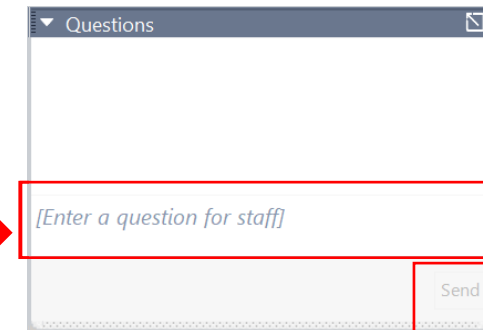
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Type questions
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during a
presentation



Click Send when ready to submit a question

UPCOMING TRAINING - EVENTS

CYBER FRIDAY LIVE WEBINAR SERIES

- | | | | |
|----------------------|--|---------------------|---|
| Sept 11, 2020 | A Deep Dive into DFARS 252.204-7012 - Looking beyond NIST 800-171 r1 | Dec 4, 2020 | Securing the Supply Chain - "No man is an island" |
| Sept 25, 2020 | Information Security - An overview of programs, general requirements and resources | Dec 18, 2020 | Developing and implementing practices, policies and procedures using CMMC reference documents |
| Oct 9, 2020 | Economic Espionage - You have what they want. | Jan 8, 2021 | The other side of CMMC |
| Oct 23, 2020 | Guarding and Securing Intangibles - Protecting what you cannot see and touch | Jan 22, 2021 | Overview of CMMC Level 1 |
| Nov 6, 2020 | Tools, practices and resources for your cyber-security toolbox | Feb 5, 2021 | Embarking on the path to CMMC Level 3 |
| Nov 20, 2020 | An overview of cyber-threats - What you can't see - can put you out of business! | Feb 19, 2021 | Preparing for a CMMC Certification assessment |
| | | Mar 5, 2021 | CMMC Level 3 - Completing the steps needed to protect Controlled Unclassified Information. |

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ACQUISITION HOUR LIVE WEBINAR SERIES

- November 17, 2020

- Changes, Delays and Disputes in Federal Construction Contracts**

- [CLICK HERE](#) for additional information

- Presented by Helen Henningsen, Wisconsin Procurement Institute

- February 17, 2021

- Acquisition Hour: Market Research – Successful Contractors Do Their Homework**

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- Presented by Kim Garber, Wisconsin Procurement Institute

- January 20, 2021

- Acquisition Hour: beta.SAM.gov - An Update and Overview**

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- Presented by Kim Garber, Wisconsin Procurement Institute

- February 23, 2021

- Acquisition Hour: Update on Federal Wage-Hour Laws**

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- Presented by Corey Walton, U.S. Department of Labor

- SAVE THE DATE -



December 8-10, 2020

The first virtual marketplace will connect statewide business owners looking to do business with state, federal and local governments, as well as the private sector, in a virtual format over the course of a week.

More info at <https://www.wispro.org/event/marketplace-2020-virtual/>



Developing and Growing Government Contractors

December 8-10, 2020

The Contracting Academy is an opportunity for businesses to grow their technical knowledge of contracting with the State of Wisconsin, Federal Government and Government Prime contractors. This series of workshops will benefit established businesses looking to grow and develop their government sales.

More info at <https://www.wispro.org/event/the-contracting-academy-virtual/>

A CRITICAL NOTICE FROM WPI

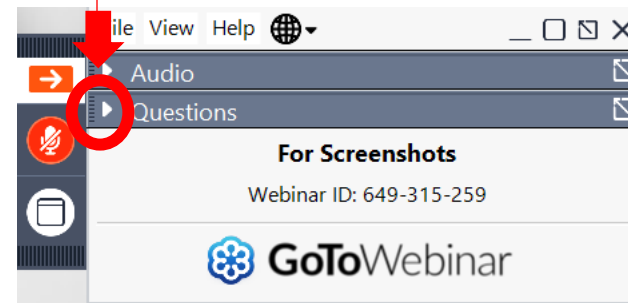
- If you are a current **FEDERAL / DOD CONTRACTOR** or **SUBCONTRACTOR** – you may have **CYBER – DATA SECURITY REQUIREMENTS** in your contract.
- If you are responding to any **CURRENT FEDERAL SOLICITATIONS** - be aware of your obligations:
 - Key clauses are 52.204-21, 252.204-7008 and 252.204-7012
 - Review for other possible requirements
- If you are a **DOD CONTRACTOR** or **SUBCONTRACTOR** – you will have new **CYBER COMPLIANCE – CERTIFICATION REQUIREMENTS** that may impact your business as early as the end of this calendar year.
 - See: <https://www.acq.osd.mil/cmmc> and <https://www.cmmcab.org> for more up to date information.
 - *Contact Marc Violante at WPI - marcv@wispro.org or 920-456-9990*

QUESTIONS?



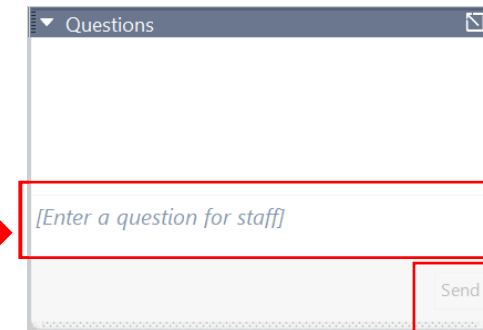
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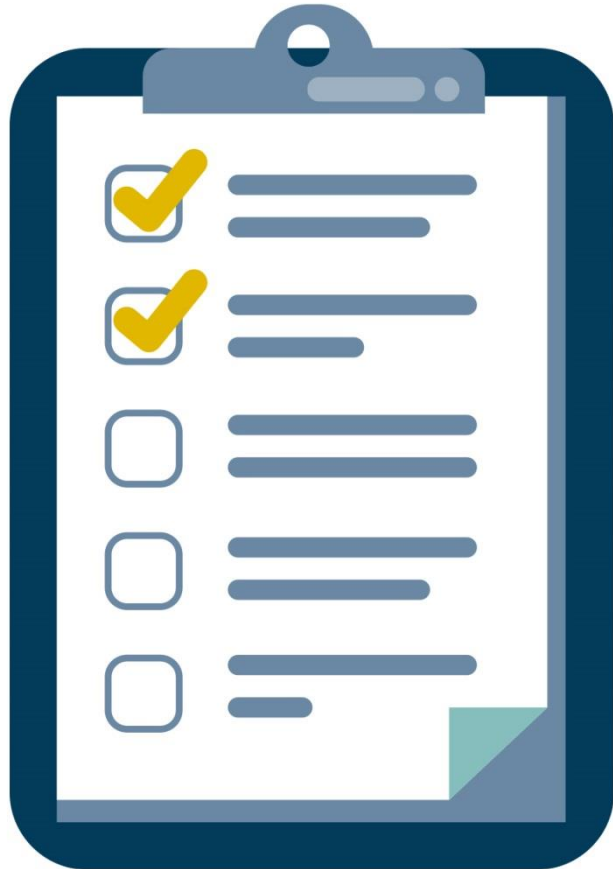
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Benjamin Blanc

benjaminb@wispro.org

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Wisconsin Procurement Institute (WPI)
www.wispro.org

Helen Henningsen
Wisconsin Procurement Institute (WPI)
helenh@wispro.org | 414-270-3600

Wenbin Yuan
Dakota Intertek Corp.
w yuan@dakotaic.com | 262-784-8844

10437 Innovation Drive, Suite 320
Milwaukee, WI 53226