

FAR Up Close  
**FAR Regulations and Clauses  
for Commercial Items**

March 3, 2021



# ABOUT WPI SUPPORTING THE MISSION

**Celebrating 34 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/GoToMeeting
- **SMALL GROUP TRAINING** – Workshops and webinars
- **CONFERENCES** to include one on one or roundtable sessions

**Last year WPI provided training at over 100 events and provided service to over 1,200 companies**

*WPI is a Procurement Technical Assistance Center (PTAC) funded in part by the Defense Logistics Agency (DLA), WEDC and other funding sources.*

# WPI OFFICE LOCATIONS

## ▪ MILWAUKEE

- *Technology Innovation Center*

## ▪ MADISON

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

## ▪ CAMP DOUGLAS

- *Juneau County Economic Development Corporation (JCEDC)*

## ▪ STEVENS POINT

- *IDEA Center*

## ▪ APPLETON

- *Fox Valley Technical College*

## ▪ SUPERIOR

- *Small Business Dev Center; UW Superior*

## ▪ OSHKOSH

- *Fox Valley Technical College*
- *Greater Oshkosh Economic Development Corporation*

## ▪ EAU CLAIRE

- *Western Dairyland*

## ▪ MENOMONIE

- *Dunn County Economic Development Corporation*

## ▪ LADYSMITH

- *Indianhead Community Action Agency*

## ▪ RHINELANDER

- *Nicolet Area Technical College*

## ▪ ASHLAND

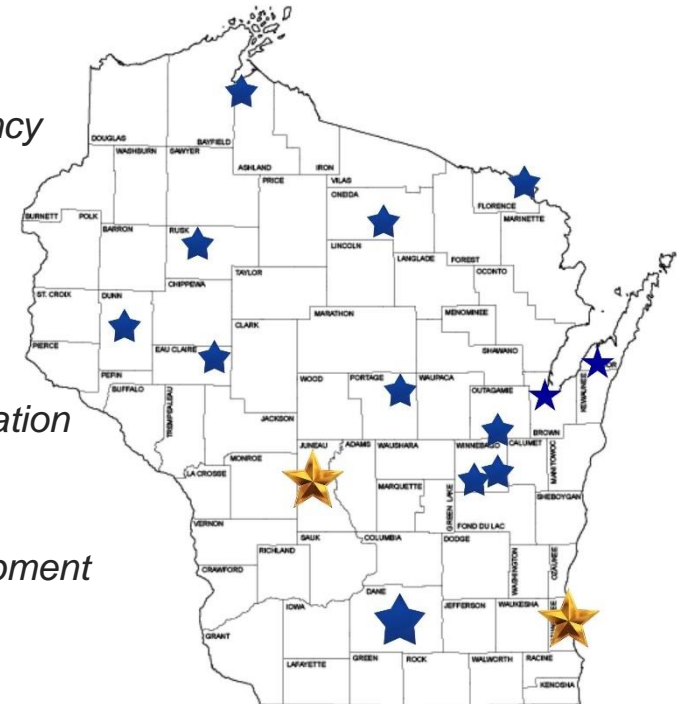
- *Ashland Area Development Corporation*

## ▪ FLORENCE

- *Florence County Economic Development*

## ▪ DOOR COUNTY

- *NE WI Technical College*
- *Door County Economic Development Corporation*





# WHAT WE WILL COVER TODAY

- Commercial Items regulations - generally
- FAR 52.212-4 Contract Terms and Conditions – Commercial Items
- FAR 52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items
- FAR 52.212-1 Instructions to Offerors – Commercial Items
- FAR 52.212-2 Evaluation -Commercial Items
- FAR 52.212-3 Offeror Representations and Certifications – Commercial Items

# COMMERCIAL ITEMS GENERALLY

# EXTREMELY SIMPLIFIED DEFINITION OF COMMERCIAL ITEMS

Items, other than real property, that have been sold, leased, or licensed to the general public, or offered for sale, lease, or license to the general public, and

Items that are available to the general public but have had minor modifications, and

Services provided in support of commercial items (ex. installation, maintenance, repair, and training), and

Services sold in substantial quantities in the commercial marketplace based on established catalogue or market prices under standard commercial terms and conditions

# DEFINITION OF COMMERCIALY AVAILABLE OFF-THE-SHELF (COTS) ITEMS

Any item of supply (including construction material) that is—

- (i) A commercial item;
- (ii) Sold in substantial quantities in the commercial marketplace; and
- (iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace.

Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

# COMMERCIAL ITEMS – STREAMLINED PROCEDURES

- Can use a combined Synopsis and Solicitation
- Can use simplified acquisition procedures (RFQs) up to \$7.5 Million (FAR subpart 13.5)
- Contracting officers must request existing product literature in lieu of solicitation unique technical proposals (when product literature is adequate)
- Uses solicitation provisions and contract requirements, terms, and conditions that are consistent with customary commercial practices
- Contracting Officers can give offerors fewer than 30 days to respond to issued solicitation (FAR 5.203)

# COMMERCIAL ITEMS –

## Contract Types (FAR 12.207)

- Firm Fixed Price (FFP),
- Fixed Price with Economic Price Adjustment (FFP EPA)
- Time and Materials (T&M) - Rarely allowed
  - Must justify with a written determination and finding (D&F) that no other contract type is suitable
- Indefinite Delivery
  - Prices still must be FFP, FFP EPA, or T&M (T&M still requires a D&F)

# COMMERCIAL ITEMS –

FAR Part 12 describes the policies and procedures unique to Commercial Items but must be used in conjunction with either:

- FAR Part 13 Simplified Acquisition Procedures
- FAR Part 14 Sealed Bidding, or
- FAR Part 15 Contracting by Negotiation

When another FAR Part is inconsistent with FAR Part 12 – FAR Part 12 takes precedence.

# CONTRACT FORMAT (FAR 12.303)

## Standard Form (SF)1449

Continuation of any Block in SF 1449 - such as:

- Block 17b for remittance address – if different than mailing
- Blocks 19 - 24
  - Lines items,
  - Schedule of Supplies,
  - Quantity,
  - Unit,
  - Unit price,
  - Amount

SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS OFFEROR TO COMPLETE BLOCKS 12, 17, 23, 24, & 30				1. REQUISITION NUMBER	PAGE 1 OF
2. CONTRACT NO.		3. AWARD/EFFECTIVE DATE	4. ORDER NUMBER	5. SOLICITATION NUMBER	6. SOLICITATION ISSUE DATE
7. FOR SOLICITATION INFORMATION CALL:		a. NAME		b. TELEPHONE NUMBER (No collect calls)	8. OFFER DUE DATE/ LOCAL TIME
9. ISSUED BY		CODE	10. THIS ACQUISITION IS		
			<input type="checkbox"/> UNRESTRICTED OR <input type="checkbox"/> SET ASIDE: % FOR: <input type="checkbox"/> SMALL BUSINESS <input type="checkbox"/> EMERGING SMALL BUSINESS <input type="checkbox"/> HUBZONE SMALL BUSINESS <input type="checkbox"/> SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS <input type="checkbox"/> 8(A) NAICS: SIZE STANDARD:		
11. DELIVERY FOR FOB DESTINATION UNLESS BLOCK IS MARKED		12. DISCOUNT TERMS		13a. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)	13b. RATING
<input type="checkbox"/> SEE SCHEDULE				<input type="checkbox"/>	
14. METHOD OF SOLICITATION					
<input type="checkbox"/> RFQ <input type="checkbox"/> IFB <input type="checkbox"/> RFP					
15. DELIVER TO		CODE	16. ADMINISTERED BY		
17a. CONTRACTOR/OFFEROR		CODE	FACILITY CODE	18a. PAYMENT WILL BE MADE BY	
TELEPHONE NO.					
<input type="checkbox"/> 17b. CHECK IF REMITTANCE IS DIFFERENT AND PUT SUCH ADDRESS IN OFFER		18b. SUBMIT INVOICES TO ADDRESS SHOWN IN BLOCK 18a UNLESS BLOCK BELOW IS CHECKED <input type="checkbox"/> SEE ADDENDUM			



# CONTRACT FORMAT (CONT.) (FAR 12.303)

## Contract Clauses

- FAR 52.212-4 Contract Terms and Conditions (May be by reference on SF 1449)
- Addendum to FAR 52.212-4
- FAR 52.212-5 Contract Terms and Conditions Required to Implement Statutes

Any Contract documents, exhibits, or attachments

# CONTRACT FORMAT (CONT.) (FAR 12.303)

## Solicitation Provisions

- FAR 52.212-1 Instructions to Offerors (May be by reference on SF 1449)
- Any Addendum to FAR 52.212-1
- FAR 52.212-2 Evaluation (or other description of evaluation factors, if used)
- FAR 52.212-3 Offerors Representations and Certifications

# FAR 52.212-4 CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS

# FAR 52.212-4 TERMS AND CONDITIONS

- We will cover the Terms and Conditions for the Commercial Items contracts that are FFP or FFP EPA.
- Alternate I to this clause is used if the solicitation will result in a Time and Materials type contract. This Alternate I clause will have different terms and conditions for :
  - Inspection and Acceptance
  - Definitions
  - Payments
  - Termination For Convenience
  - Termination for Cause

# INSPECTION AND ACCEPTANCE

- Contractor required to provide items/services that conform to contract requirements
  - Government primarily and generally will rely upon the contractor's quality control system
  - The intent is to eliminate the burden of government unique testing and inspection prior to acceptance
- However, Government still reserves the right to inspect or test any supplies or services that have been tendered for acceptance.

# INSPECTION AND ACCEPTANCE

- Also, Government has significant Post-Acceptance rights if the supplied item or service does not conform with requirements-
- Within a reasonable time, Government can demand:
  - Repair
  - Replacement
  - Re-performance, or
  - Can seek an equitable price reduction or other adequate consideration for accepting nonconforming supplies or services

# PAYMENT

- Payments are made in accordance with Prompt Payment Act
  - Amounts due the contractor shall bear simple interest from the date due unless paid within 30 days of becoming due (<https://www.fiscal.treasury.gov/prompt-payment/rates.html>)
- Electronic Funds Transfer (EFT) – Government makes payment using EFT
- Overpayments – Instructs how Contractor remits overpayment back to Government Payment Office

# TERMINATIONS (SEE ALSO FAR 12.403)

FAR Part 49 Termination of Contracts, is only used as guidance

## Termination for Convenience

- Contractor paid the percentage of price reflecting the percentage of work performed and costs resulting from termination (does not need to comply with Cost Accounting Standards)

## Termination for Cause

- For default, failure to comply with terms and conditions, and/or failure to provide assurance of future performance upon request.
- Government not liable for performance that is not accepted and the contractor is liable for “any and all rights and remedies provided by law.”
- Improper Termination for Cause will be deemed a Termination for Convenience

# WARRANTIES

Implied Warranty of Merchantability - provides that an item is reasonably fit for the ordinary purposes for which such items are used.

- Must be of at least average, fair or medium-grade quality

Implied Warranty of Fitness for a Particular Purpose - provides that an item is fit for use for the particular purpose for which the Government will use the items.

- To be in effect the seller must know specifically how the Government will use the item.

Express Commercial Warranties – Government usually requires offerors to offer government the same commercial warranty that is available to the general public.

- Commercial warranty should be stated in the offer – it is not included in 52.212-4

# UNAUTHORIZED OBLIGATIONS - END USER LICENSE (EUL) AGREEMENTS AND/OR TERMS OF SERVICE (TOS) AGREEMENTS WITH INDEMNIFICATION REQUIREMENTS

- Any such indemnification clause which violates the Anti-Deficiency Act is unenforceable
- Government shall not be deemed to have agreed – regardless of clicking an “agree” click box or comparable mechanism
- Any such indemnification clause is deemed to be stricken from the EUL, TOS, or similar legal agreement.

# OTHER TERMS

- Assignment - Contractor can only assign rights to payment to a financial institution in accordance with Assignment of Claims Act
- Changes - All changes must be agreed to by both Parties
- Disputes - Will be under the Contract Disputes Act
- Definitions- Incorporates definitions clause 52.202-1

# OTHER TERMS (CONT.)

- Excusable Delays – Contractor not liable for nonperformance due to causes outside its control
- Invoice – Submit original and 3 copies (or electronic if authorized)
  - Details on what must be in the invoice – follow the instructions!
- Patent Indemnity - Contractor shall indemnify the Government against liability for any actual or alleged Patent, Trademark, or Copyright infringement arising out of performance of the contract

# OTHER TERMS (CONT.)

- Risk of Loss – Risk of loss on items passes to the Government upon:
  - delivery of supplies to the Carrier if transportation is f.o.b. origin, or
  - delivery to the government if transportation is f.o.b. destination.
- Taxes - Contract Price includes all applicable taxes
- Title - Title to items passes to Government upon acceptance

# OTHER TERMS (CONT.)

- Limitation of Liability – Contractor is not liable for consequential damages resulting from deficiency in defective item
- Other Compliances - Contractor must comply with all applicable laws, Executive Orders, and regulations
- Compliance with Laws unique to the Government – kickbacks, procurement integrity, whistleblower protections and more

# ORDER OF PRECEDENCE

- In the event of conflict or ambiguity the following is the order of precedence:
  - The Schedule of Supplies/Services
  - Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws unique Gov't., Unauthorized Obligations
  - FAR 52.212-5
  - Addenda
  - Solicitation provisions
  - FAR 52.212-4
  - Other documents, exhibits, and attachments
  - The Specifications

# TAILORING

- Tailoring cannot be inconsistent with commercial practice for the commercial item being acquired unless a waiver is approved in accordance with agency procedures
- Tailoring shall be by addenda to the solicitation
  - The clause itself is not changed, additions or changes to the substance of the clause will usually be after the clause
  - If SF 1449 is used, Block 27 will show if addenda are attached

# TAILORING

- The following cannot be tailored
  - Assignments
  - Disputes
  - Payment (except as provided in FAR subpart 32.11)
  - Invoice
  - Other compliances
  - Compliance with laws unique to Government contracts; and
  - Unauthorized obligations (re: indemnification)

# FAR 52.212-5 CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS – COMMERCIAL ITEMS

# FAR 52.212-5 CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS-COMMERCIAL ITEMS.

Incorporates, by reference, numerous FAR clauses into the Commercial Item Contract (ex. set asides, labor laws, country of origin restrictions, and much more)

Contains provisions regarding the Comptroller General's right to view records

Specifically identifies the clauses the Prime contractor is required to flow down to subcontractors

# FAR 52.212-1 INSTRUCTIONS TO OFFERORS – COMMERCIAL ITEMS

# SUBMISSION OF OFFERS (FAR 52.212-1)

Offers must be signed and dated

Offers may be submitted on the SF 1449, letterhead stationary or as otherwise specified in solicitation

- Strongly recommend using the SF 1449

Offer must be submitted to the office (including room number) specified in the solicitation

Offer must be submitted at or before the exact date and time specified in the solicitation

# OFFER MUST SHOW (FAR 52.212-1)

Solicitation number

Time specified in solicitation for receipt of offers

Name, address, and phone number of the offeror

Technical description of what is being offered

Warranty terms

Price and discount terms

“Remit to“ address if different from mailing address

# OFFER MUST SHOW (CONT.) (FAR 52.212-1)

Completed representations and certifications

- Often done electronically in SAM, but need to identify changes, if any

Acknowledgement of all solicitation amendments

Past Performance information (when an evaluation factor)

If not using 1449, statement specifying the extent of agreement with the terms, conditions, and provisions of the solicitation

- Taking exception to any terms, conditions and provisions could be cause for rejection of offer

# FAR 52.212-2 EVALUATION – COMMERCIAL ITEMS

# FAR 52.212-2 EVALUATION

- States Government will make award to the responsible offeror whose offer, conforming to the solicitation, will be most advantageous to the Government considering price and other factors
- Identifies the significant evaluation factors (ex. Technical Capability, Past Performance and Price)

# FAR 52.212-2 EVALUATION (CONT.)

- Gives relative importance of each of the evaluation factors to each other
  - (ex. Evaluation factors are listed in descending order of importance.)
- Gives the relative importance of Price in comparison to all other factors combined
  - (ex. Technical and Past Performance, when combined, are more important than price)

# FAR 52.212-2 EVALUATION (CONT.)

- Options:
  - Price is evaluated by adding the total price for all options to the total price for the basic requirement
  - If option prices are significantly unbalanced, the offer may be deemed unacceptable
  - Evaluation of options does not obligate the government to exercise the options

# FAR 52.212-2 EVALUATION (CONT.)

- Government acceptance of the offer, results in a binding contract
- Government may accept an offer, or part of an offer, before the offer's expiration time, whether or not there are negotiations
- However, prior to Government acceptance, an Offeror may rescind the offer by submitting a written notice of withdrawal.

# FAR 52.212-2 EVALUATION- TAILORING

- Rather than FAR 52.212-2, a similar provision can be used which contains all evaluation factors required by
  - 13.106, Simplified Acquisition Procedures (for RFQs),
  - Subpart 14.2 Sealed Bidding (for IFBs), or
  - Subpart 15.3 Contracting by Negotiation (for RFPs), as applicable
- When a “similar provision” is used in lieu of FAR 52.212-2, it may be inserted in the solicitation as an addendum

# FAR 52.212-3 OFFEROR REPRESENTATIONS AND CERTIFICATIONS – COMMERCIAL ITEMS

# REPRESENTATIONS AND CERTIFICATIONS

Offerors usually will only need to fill out paragraph (b) of FAR 52.212-3 verifying

- The Reps and Certs in SAM have been updated in the last 12 months,
- They are current, accurate and complete and are incorporated into the offer by reference.

In this paragraph, Offerors are required to identify any exceptions to the above statements –identifying where representations or certifications, that are different from those in SAM, are provided for the particular solicitation only.

(b) (1) *Annual Representations and Certifications.* Any changes provided by the Offeror in paragraph (b) (2) of this provision do not automatically change the representations and certifications in SAM

(2) The offeror has completed the annual representations and certifications electronically in SAM accessed through <http://www.sam.gov>. After reviewing SAM information, the Offeror verifies by submission of this offer that the representations and certifications currently posted electronically at FAR [52.212-3](#), Offeror Representations and Certifications-Commercial Items, have been entered or updated in the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard(s) applicable to the NAICS code(s) referenced for this solicitation), at the time this offer is submitted and are incorporated in this offer by reference (see FAR [4.1201](#)), except for paragraphs \_\_\_\_\_.

*[Offeror to identify the applicable paragraphs at (c) through (v) of this provision that the offeror has completed for the purposes of this solicitation only, if any.*

*These amended representation(s) and/or certification(s) are also incorporated in this offer and are current, accurate, and complete as of the date of this offer.*

*Any changes provided by the offeror are applicable to this solicitation only, and do not result in an update to the representations and certifications posted electronically on SAM.]*

# RESOURCES

# RESOURCES

- FAR: <https://www.acquisition.gov/?q=browsefar>
- Beta.sam.gov: <https://beta.sam.gov/>
- Wisconsin Procurement Institute  
Phone: 414-270-3600 [www.wispro.org](http://www.wispro.org)

# UPCOMING TRAINING - EVENTS

# CYBER FRIDAY LIVE WEBINAR SERIES

**Mar 5, 2021** CMMC Level 3 - Completing the steps needed to protect Controlled Unclassified Information.

**Mar 19, 2021** Managing Vendor Risk

**April 16, 2021** Your Cyber Plan Cannot Be Static – Here's Why!

**April 30, 2021** Testing and Strengthening Your Cyber-Defenses Using Exercises

**May 14, 2021** Corporate Acquisition, Insider threats, or Strategic Investments – All Threats to Consider

Register at: <https://www.wispro.org/faqs/what-is-wpis-current-cyber-friday-webinar-schedule/>

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TECHNOLOGY  
INNOVATION CENTER  
— at RESEARCH PARK



# ACQUISITION HOUR LIVE WEBINAR SERIES

▪ March 10, 2021

**Acquisition Hour: Using Data to Develop Your Federal Business Strategic Plan**

[CLICK HERE](#) for additional information

Presented by Marc Violante, Wisconsin Procurement Institute

▪ March 23, 2021

**The SBA 8(a) Certification Program and Small Disadvantaged Businesses (SDB)**

[CLICK HERE](#) for additional information

Presented by Shane Mahaffy, U.S. Small Business Administration

▪ March 16, 2021

**Acquisition Hour: The HUBZone Program – Certification Benefits and Regulations**

[CLICK HERE](#) for additional information

Presented by Shane Mahaffy, U.S. Small Business Administration

▪ March 24, 2021

**Acquisition Hour: Using the New FPDS and Desktop Tools to Analyze Federal Procurement Data**

[CLICK HERE](#) for additional information

Presented by Marc Violante, Wisconsin Procurement Institute

▪ March 17, 2021

**Acquisition Hour: Responding to Sources Sought Request and Capabilities Statements**

[CLICK HERE](#) for additional information

Presented by Helen Henningsen and Mark Dennis, Wisconsin Procurement Institute

▪ April 6, 2021

**Acquisition Hour: Intellectual Property for Government Contractors & Subcontractors & the STTR/SBIR Stakeholder**

[CLICK HERE](#) for additional information

Presented by Laura Grebe, Husch Blackwell

# 8<sup>th</sup> Annual FAR Evening Study Sessions

Presented by the National Contract Management Association (NCMA Wisconsin) and WPI

**February 2, 2021**    Intro & FAR Part 16

**March 2, 2021**    FAR Parts 19-29

**February 9, 2021**    FAR Parts 1-4

**March 9, 2021**    FAR Parts 30-33

**February 16, 2021**    FAR Parts 5-12

**March 16, 2021**    FAR Parts 34-41

**February 23, 2021**    FAR Parts 13-18

**March 23, 2021**    FAR Parts 42-53

Register at: <https://www.wispro.org/wpis-2021-far-evening-study-sessions-schedule/>



# 2021 FAR Up Close Series

<b>February 10, 2021</b>	Overview of the FAR
<b>February 17, 2021</b>	FAR Regulations and Clauses on Subcontracting
<b>March 3, 2021</b>	FAR Regulations and Clauses in Commercial Items
<b>March 10, 2021</b>	FAR and DFARS Regulations and Clauses in Manufacturing Contracts
<b>March 17, 2021</b>	FAR Regulations and Clauses in Federal Service Contracts
<b>April 7, 2021</b>	FAR Clauses in Federal Construction Services
<b>April 14, 2021</b>	FAR Regulations for Procurement of Architect Engineer Services

# CYBERSECURITY – UPDATE – DECEMBER 2020

- CMMC -
  - Implementation continues
  - Pathfinder contracts to be announced soon – article, Dec 1, 2020
    - CMMC requirements will be included
  - Full implementation expected by Oct 2025
- New clauses and requirements –
  - DFARS 252.204-7019
  - DFARS 252.204-7020 – applies to contracts subject to 252.204-7012
    - With few exceptions, these requirements apply to all Primes and Subcontractors
    - Consistent with philosophy shift of self-attest to verifiable
    - Three levels – Base – self-performed , Medium & High - DCMA

# 252.204-7020 – BASIC ASSESSMENT

- Requires
  - System Security Plan(SSP)
  - Plan of Action – with dates for outstanding items
  - Basic Assessment
- Six elements uploaded to Supplier Performance Risk System (SPRS)
  1. System Security Plan name (if more than one system is involved)
  2. Brief description of Plan Architecture
  3. CAGE code associated with SSP
  4. Date Assessment performed
  5. Summary Score
  6. Date a score of 110 to be achieved

# CURRENT CYBER REQUIREMENTS

- FAR 52.204-21 – Federal Contract Information
- DFARS 252.204-7012
- Requirements cited in solicitation/contract

Need assistance – please contact Marc Violante from WPI at [marcv@wispro.org](mailto:marcv@wispro.org) or 920-456-9990

# CONTINUING PROFESSIONAL EDUCATION



CPE Certificate available, please contact:

**Benjamin Blanc**

[benjaminb@wispro.org](mailto:benjaminb@wispro.org)

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