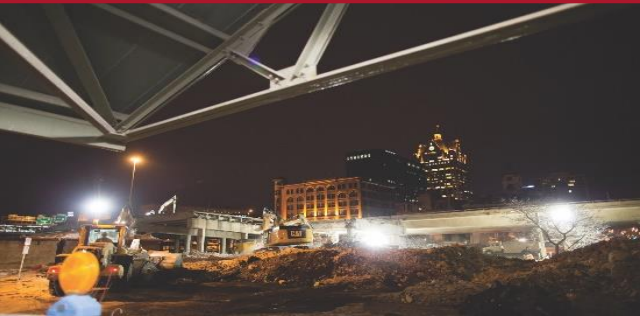


FAR Up Close
FAR Clauses in Federal Construction Services

April 7, 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

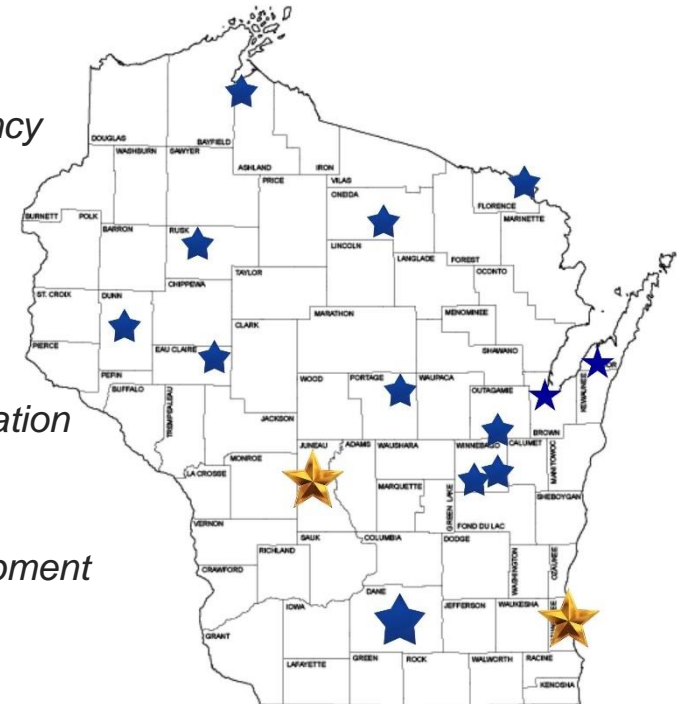
- *Ashland Area Development Corporation*

▪ FLORENCE

- *Florence County Economic Development*

▪ DOOR COUNTY

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





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BLOG SERVICES ABOUT **CLIENT PORTAL** SPONSORSHIP CONTACT

WPI Wisconsin Procurement Institute
 A Procurement Technical Assistance Center (PTAC)

EVENT CALENDAR FEDERAL GOVERNMENT STATE & LOCAL GOVERNMENT GRANTS SUCCESS & AWARDS FAQs

CURRENT EDITION OF THE WPI NEWSLETTER

www.wispro.org

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

[View More...](#)

CURRENT OPPORTUNITIES (1)

GET STARTED WITH THE BASICS
Questions & answers on how to get started.

GET STARTED

SIGN-UP FOR OUR NEWSLETTER
Stay up-to-date with the latest WPI news.

SIGN UP

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

- Bonding
- The Davis Bacon Act
- The Changes Clause for Construction
- The Suspension of Work Clause
- The Differing Site Conditions Clause
- Brand name or Equal
- Certified Cost or Pricing Data on Modifications

BONDING

(FAR PART 28 AND FAR 52.228)

BID GUARANTEE / BID BOND FAR 52.228-1

Only required when a Performance Bond or a Performance and Payment Bond are also required.

Protects the Gov't in the event that the bidder fails to execute the contract documents or fails to timely provide any required Performance and Payment bonds

Amount of the Bid Guarantee is usually 20% of the bid price but shall not exceed \$3 million

Bid Guaranty must be submitted with initial bid/offer and must be accompanied by a Power of Attorney document that documents evidence of the signatory's authority to bind the surety

FAILURE TO PROVIDE REQUIRED BID GUARANTEE

In sealed bidding (IFB), noncompliance with a solicitation requirement for a Bid Guarantee generally requires rejection of the bid.

In negotiated procurements:

if award is going to be made on initial proposals noncompliance with Bid Guarantee requirement also generally requires rejection of the offer.

if discussions are held and revised proposals requested from the offeror, the noncompliance can be corrected in the revised proposal.

However, noncompliance with the Bid Guarantee requirement will be waived in the specific circumstances described in FAR 28.101-4(c).

PERFORMANCE AND PAYMENT BONDS - NO CONSTRUCTION LIENS

- The contractor is required to provide Performance and Payment Bonds on any construction contract over \$150,000
- A Performance Bond - ensures project will be completed
- A Payment Bond – ensures subs and suppliers get paid

NOTE- the Prime Contractor's Payment Bond does not cover subcontractors at the third tier or lower.

PERFORMANCE AND PAYMENT BONDS – FAR 52.228-15

- The penal amount of Performance and Payment Bonds are each normally 100% of the contract price – (additional protection may be required under certain circumstances ex. if the contract price increases FAR 52.228-2)
- Normally due within 10 days of the Notice of Award.
- Failure to timely provide acceptable Performance and Payment Bonds is grounds for termination for default and claim under the Bid Guarantee

BONDS

- Must use the Standard Forms (SFs) for Bonds - FAR 28.106-1
 - SF 24 Bid Bond (pre-award)
 - SF 25 Performance Bond
 - SF 25 A Payment Bond

ALTERNATE PAYMENT PROTECTIONS (FAR 52.228-13) -

For construction contracts between \$35,000 and \$150,000, the Contractor is required to submit one of the payment protections selected by the Contracting Officer (CO).
(FAR 28.102-1(b)(1))

The CO may select as options one or more of the following:

- (a) Payment bond
- (b) Irrevocable letters of credit (FAR 52.228-14)
- (c) Tripartite escrow agreement or
- (d) Certificates of deposit

Amount of the payment bond protection must be 100% of contract price

SURETIES

- **Corporate Surety**—must be on list contained in Department of Treasury Circular 570 “Companies Holding Certificates of Authority As Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies.”
- **Individual Surety** – must include pledged security assets equal to, or greater than, the aggregate penal sum of the bonds.

THE DAVIS BACON ACT (FAR SUBPART 22.4 AND 52.222-6)

THE DAVIS BACON ACT

- Applies to federal construction contracts over \$2,000
- Laborers and mechanics working onsite shall be paid at least the prevailing wage rates/fringe benefits set by the Department of Labor
- Certified Payrolls shall be provided by Prime and Subcontractors as part of “daily report”

THE DAVIS BACON ACT - FAR 52.222-6

- Applies to all laborers & mechanics
- That are working onsite - The Act is “site-based”
- Includes alteration, repair, painting & decorating
- Requires payment of prevailing wages AND weekly payment of wages
- Contractors and subcontractors are also required to post Davis-Bacon poster and applicable wage determination on the jobsite in a place easily seen by workers

THE DAVIS BACON ACT VIOLATIONS

Penalties can include:

- Contract payments withheld or suspended to satisfy unpaid wages and liquidated damages FAR 22.406-9
- Contract can be terminated for default FAR 22.406-11
- If violation is aggravated or willful - Debarment for up to 3 years
- False payroll certifications – possibly treble damages for violating the False Claims Act (*United States ex rel. Brian Wall v. Circle C. Construction, LLC*)

SOME OTHER DBA CLAUSES

- 52.222-7, Withholding of Funds - *if there are violations, CO may suspend further payment until corrected*
- 52.222-8, Payrolls and Basic Records - *must maintain records for 3 years after completion of project*
- 52.222-9, Apprentices and Trainees – *Specifies the rules for Apprentices and Trainees*
- 52.222-11, Subcontracts (Labor Standards) – *Specifies the Subcontract flow down requirements for Davis Bacon Act related clauses*

SOME OTHER DBA CLAUSES

- 52.222-12, Contract Termination-Debarment - *Breach of wage related contract clauses is grounds for termination and debarment*
- 52.222-13, Compliance with Davis-Bacon and Related Act Regulations - *All rulings and interpretations of the Construction Wage Rate Requirements and of statutes related to 29 CFR parts 1,3, and 5, are incorporated by reference into the contract*

THE CHANGES CLAUSE FOR CONSTRUCTION (FAR 52.243-4)

FAR 52.243-4 CHANGES CLAUSE

Found in federal firm-fixed price construction contracts over the simplified acquisition threshold (SAT), 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.
- If a change causes an increase or decrease in Contractor's costs, the CO must make an equitable adjustment to the contract price
 - Contractor must assert it's right to the equitable adjustment within 30 days

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.
- **Supplemental Agreement** - 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 is required to 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.

IS DELAY A CHANGE?

- Government delays preceding a change are not recoverable under the standard FAR changes clauses.
- However an equitable adjustment under the changes clause could include costs resulting from delays caused by the change after its issuance.
- Under the equitable adjustment provision in the standard FAR changes clause you are entitled to reasonable costs and profit.

CHANGES – PRACTICAL TIPS

- Read any agency supplemental clauses on changes that are in the contract.
- When change proposals are requested –
 - Submit proposals promptly
 - Make sure the proposal is complete
 - Itemized breakdown that includes materials, quantities, unit prices, labor costs, and equipment.
 - Ensure that all costs, overhead, and profit are accounted for

CHANGES – PRACTICAL TIPS

- Negotiate Supplemental Agreements with the Government as early as possible.
- Read and make sure that you understand any release language contained in the Supplemental Agreements.
- Identify any Constructive Changes promptly and provide the Contracting Officer with proper notice.

SUSPENSIONS OF WORK – DELAYS

(FAR 52.242-14)

DELAYS

- Non Excusable – Under Contractor's control - Contractor bears it's own costs and government has remedies (ex. damages, termination)
- Excusable Delay - Beyond the control and without the fault or negligence of the Contractor
 - Compensable
 - Suspension of Work Clause – may be entitled to time and costs
 - Changes Clause- may be entitled to time, costs, and profit
 - Non-compensable - Contractor entitled to a time extension for excusable delays – but no money

← Today's focus

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

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 –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
- Loss of Efficiency

NOTE: Contractor must make reasonable efforts to mitigate damages

REQUESTING RELIEF FOR EXCUSABLE DELAY

Contractor's request should demonstrate:

- 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)

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 - PRACTICAL TIPS

- Get the baseline schedule approved early
- Maintain accurate monthly schedule updates. Discuss all possible delay issues with the Government early.
- Remember the notice requirements for constructive suspensions
- Always take reasonable steps to mitigate delays and mitigate any delay damages
- Keep detailed records. The Government often audits delay claims.

THE DIFFERING SITE CONDITIONS CLAUSE (FAR 52.236-2)

DIFFERING SITE CONDITIONS FAR 52.236-2

Type 1 – contract documents implicitly or explicitly indicate a particular condition, and the contractor relied upon that contract indication

Type 2 – conditions encountered were unusual and not known at contract award – materially different from those ordinarily encountered

Contractor is entitled to increased costs that are solely attributable to the Differing Site Condition

- Contractor should provide prompt written notice.
- Contractor cannot recover costs if Contractor could have discovered the condition by reasonable pre-award site investigation

DIFFERING SITE CONDITIONS FAR 52.236-2

- When you discover a Differing Site Condition
 - Immediately stop any work that would disturb the differing condition
 - Notify the CO in writing before conditions are disturbed (*shifts risk to government*)
 - Wait for Directions from the CO
 - Document your file (time, date, result)

BRAND NAME OR EQUAL (FAR 52.211-6)

BRAND NAME OR EQUAL – FAR 52.211-6

- Government specifies a requirement by:
 1. Identifying a brand name, make, and model of an acceptable item, and
 2. Specifying the salient characteristics that any “equal” item must meet.
- Any offer for “equal” item must provide information sufficient to show salient characteristics are met
- If “equal” is not identified in the bid/proposal, the Contractor must provide the brand name

CERTIFIED COST OR PRICING DATA ON MODIFICATIONS

CERTIFIED COST OR PRICING DATA ON MODIFICATIONS AND AUDIT RIGHTS

Per FAR 15.403-4 Certified Cost or Pricing Data may be required for the modification of any sealed bid or negotiated contract, if the modification exceeds the threshold (currently \$2,000,000).

It doesn't matter whether certified cost or pricing data was originally required for the contract

Subcontractors may also be required to provide Certified Cost or Pricing Data

Per FAR 52.215-2, if the contractor/subcontractor was required to provide certified cost or pricing data for a modification, the Contracting Officer has the right to examine and audit all of the contractor records related to the modification.

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

QUESTIONS?



UPCOMING TRAINING - EVENTS

CYBER FRIDAY LIVE WEBINAR SERIES

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

May 28, 2021 The Cybersecurity Plan Looks Great

June 11, 2021 Blockchain

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

PRESENTED BY



ACQUISITION HOUR LIVE WEBINAR SERIES

- April 13, 2021

Acquisition Hour: Veterans' Small Business Certifications – Federal and State

[CLICK HERE](#) for additional information

Shane Mahaffy, U.S. Small Business Administration and Tondra Davis, State of Wisconsin Department of Administration

- April 20, 2021

Acquisition Hour: Introduction to Certifications Available to Minority Owned Businesses

[CLICK HERE](#) for additional information

Tondra Davis, Wisconsin Department of Administration; Madalena Maestri, Wisconsin Department of Transportation; Benjamin Blanc, Wisconsin Procurement Institute

- April 21, 2021

Acquisition Hour: Learning about the Surety Bond Guarantee from the U.S. SBA

[CLICK HERE](#) for additional information

Presented by Tamara Murray, U.S. Small Business Administration

8th 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

February 10, 2021	Overview of the FAR
February 17, 2021	FAR Regulations and Clauses on Subcontracting
March 3, 2021	FAR Regulations and Clauses in Commercial Items
March 10, 2021	FAR and DFARS Regulations and Clauses in Manufacturing Contracts
March 17, 2021	FAR Regulations and Clauses in Federal Service Contracts
April 7, 2021	FAR Clauses in Federal Construction Services
April 14, 2021	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 or 920-456-9990

CONTINUING PROFESSIONAL EDUCATION



CPE Certificate available, please contact:

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benjaminb@wispro.org

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