



An APEX Accelerator

Acquisition Hour: Negotiation Strategies in Federal Contracting

June 12 | Noon – 1:00 pm

Presented by:

Carol Murphy, Wisconsin Procurement Institute



Webinar Etiquette

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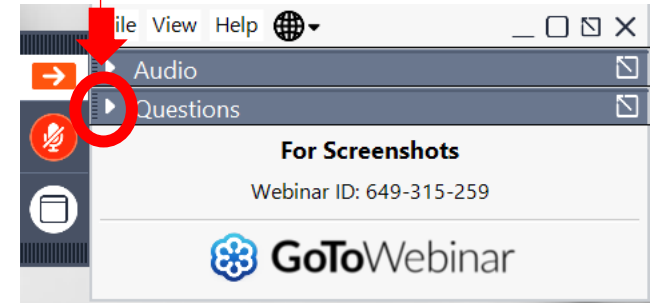
- Log into the GoToWebinar session with the name that you registered with online
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- Use the QUESTIONS option to ask your question(s).
 - We will share the questions with our guest speaker who will respond to the group

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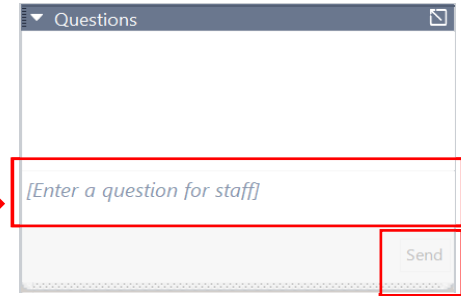
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Assisting Wisconsin businesses compete in the government marketplace.

WPI is Wisconsin's APEX ACCELERATOR

The APEX Accelerators program, under management of the Department of Defense (DOD) Office of Small Business Programs (OSBP), plays a critical role in the Department's efforts to identify and engage with a wide range of businesses entering and participating in the defense supply-chain. The program provides the education and training that all businesses need to participate to become capable of participating in DOD and other government contracts.

WPI provides services to all of Wisconsin's 72 counties

- Individual counseling at our offices, client's facility or virtually
- Small group training – webinars and workshops
- Conferences including one on one buyer meetings – Marketplace, The Contracting Academy, Small Business Academy, Wisconsin Federal Contractor Forum, Acquisition Hour, Cyber Fridays, DOD Roadmap series, Government Opportunities Business Conference, End of Year Federal Contractor Update, Annual DOD Contract Management Update, Evening FAR sessions and more.....

www.wispro.org

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)*

■ EAU CLAIRE

- *Western Dairyland*

■ FOND DU LAC

- *Envision Greater Fond du Lac*

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- *NWTC Startup Hub*

■ LACROSSE

- *Veterans in Professions*

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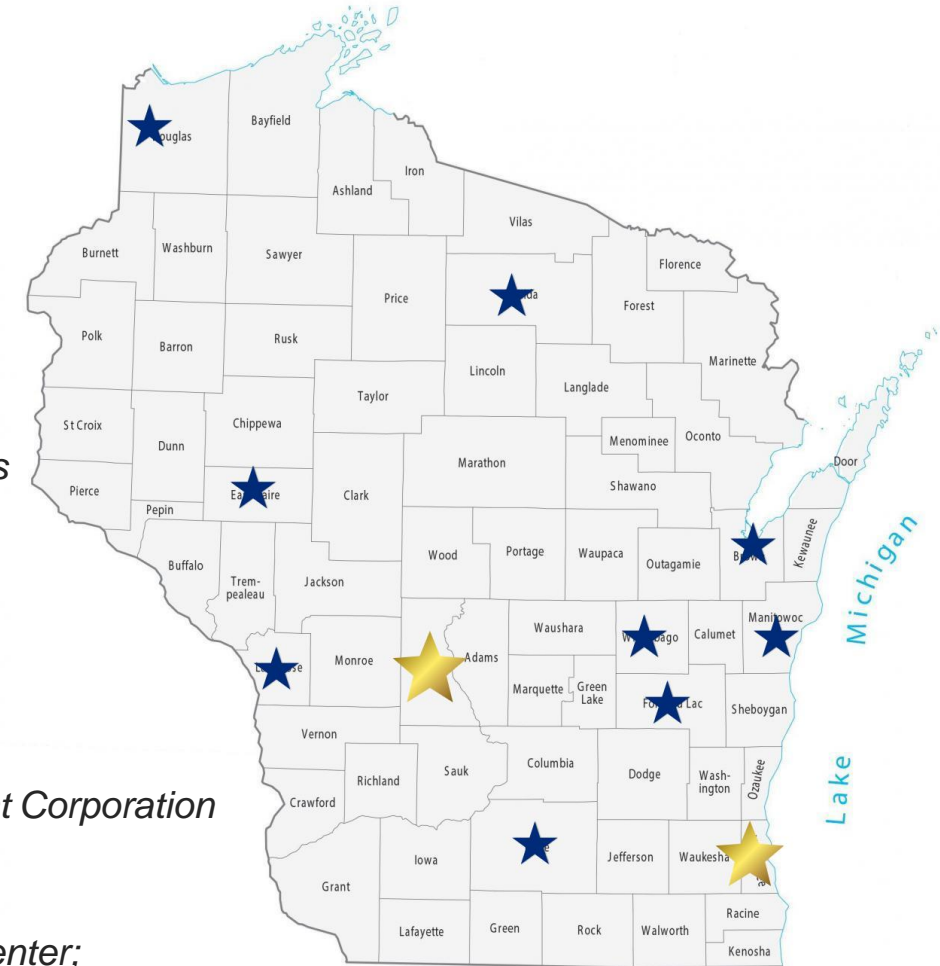
- *Progress Lakeshore*

■ OSHKOSH

- *Greater Oshkosh Economic Development Corporation*

■ SUPERIOR

- *Small Business Dev Center; UW Superior*



APEX ACCELERATORS

WISCONSIN APEX ACCELERATOR

UPCOMING EVENTS

- APR 1:00 pm - 2:00 pm
16 Acquisition Hour: SAM.gov – Tools for Contracting
- APR 9:00 am - 12:00 pm
24 Government Certification Workshop – State Certifications – Madison, WI
- APR 12:00 pm - 1:00 pm
24 Acquisition Hour: Overview of the Contractor Performance Assessment Reporting System (CPARS)
- APR April 30, 2024 - May 3, 2024
30 Lieutenant Governor's Small Business Academy
- MAY 8:00 am - 4:00 pm
16 10th Annual DoD Contract Management Update — Appleton, WI

What we will Cover Today

- General Negotiation Strategies
- Pre-Award Negotiations
 - Competitive procurements (Commercial items, Construction design-bid-build, design-build, R&D and other non-commercial items)
 - Sole Source / non-competitive procurements
- Post – Award Negotiations
 - Requests for Equitable Adjustments
 - Termination Settlements
 - Using Alternate Dispute Resolution for Claims and Disputes
- Key Concepts for Negotiating Price

General Negotiation strategies

Essential for negotiation

- Good faith – both parties should ..
 - Be honest in their negotiations
 - Have a true desire to reach agreement
 - Strive for an agreement that is fair and reasonable for both sides - important for the agreement to endure
 - Be willing to listen and respond
 - Act professionally

“Each party should gain from the negotiation.”

Dale Carnegie

Essential for negotiation

- Flexibility – Both sides should ..
 - Understand that their maximum positions will likely not prevail
 - Have “Actual Authority” to make concessions during the negotiation
 - Strive to be creative in problem solving and open to alternatives and change

“We cannot negotiate with people who say what is mine is mine and what’s yours is negotiable”

John F. Kennedy

Some Traits of good negotiators

- Integrity
- Capable of making decisions relatively quickly
- Able to think affirmatively - able to look for ways to get things done
- Comfortable questioning and challenging the statements of the opposing side
- A sense of humor – able to lighten the atmosphere when necessary
- Unconcerned with whether the opposing side likes them

Preparing for negotiation

- Determine who will be negotiating (individual or team)
- Know the party you are negotiating with (motivations, background, reputation, past agreements)
- Make a list of every single point or issue to be negotiated
 - Categorize the flexibility on each point (“must have”, and “can be conceded”)
 - Look for ways to tie your “must have” points with those that “can be conceded”
 - Set maximums and minimums for individual points or issues
 - Clearly understand your authority to settle each point within the maximums and minimums

Preparing for negotiation

- Identify and understand the underlying data, facts, and motivations
- Try to anticipate opposing views and reactions on each point and prepare rebuttal - play “devil’s advocate”
- Determine your Best Alternative to a Negotiated Agreement (BATNA) and, if possible, your opponent’s BATNA
- Realistically evaluate bargaining position on both individual points and on overall success (BATNAs, time constraints, importance to each party)
- Determine your overall maximum and minimum positions

Conducting the Negotiation - Dos

- Always keep in mind the overall Negotiation Objectives - focus on win/win
- Determine the authority of the opposing party
- Use objective standards whenever possible (industry standards, historical experience, projections based on quantitative analysis)
- Only make concessions on flexible points (“can be conceded” points) if they bring you closer to agreement on your less flexible points (“must haves”)
- Take notes during the negotiation and prepare a memo after the negotiations detailing what transpired

Conducting the Negotiation - Don'ts

- Don't make concessions without getting something in return
- Don't discuss terms of other contracts or agreements
- Don't bluff – unless you are prepared to have the bluff called
- Don't go into a negotiation meeting unprepared
- Don't treat opposing side as inferior or make things personal - attack the problem not each other

Pre-Award Negotiations with the federal government

Pre-Award Negotiation - Government's Goals and Motivations

- The MISSION - Get the user what they need when they need it
- Award within available funding
- Obtain a final proposal that provides the best possible overall value
- Comply with all applicable acquisition laws, rules, and regulations
 - Competition in Contracting Act
 - Federal Acquisition Regulations
 - Avoid successful protest
- Ensure the price is a Fair and Reasonable price - Government wants contractor to make a reasonable profit

Negotiated acquisitions in the Federal Government

- FAR part 15 states that it prescribes policies and procedures governing competitive and noncompetitive “negotiated acquisitions.”
- A contract awarded using other than sealed bidding procedures is a “negotiated contract”
 - Requests for Proposals (RFP)
 - Requests for Quotations (RFQ)

Our focus: FAR part 15 – Contracting by Negotiation

Contracting By Negotiation –discussions

- Discussions are mutual exchanges of information between the government and an offeror taken with the intent of giving the offeror an opportunity to revise its proposal
- Objective of discussions - maximize the Government's ability to obtain the best value (FAR 15.306(d)(2))
- In an RFP, “clarifications” are different than “discussions” (FAR 15.306(a))

Contracting By Negotiation –discussions

- Negotiations will occur ONLY if discussions are held
- If the solicitation states the government intends to “award without discussions” assume negotiations will not occur
- If discussions are held with one offeror, meaningful discussions must be held with all offerors in the competitive range

Discussions

If Discussions are held in a RFP...

- Government must communicate all identified significant weaknesses and deficiencies in the proposal
- Government may ask for a price breakdown –
 - to ensure every requirement is included or because they think the price is low – price realism
 - to negotiate lower pricing because they think price is high – price reasonableness

Discussions

The negotiations might feel limited!

- Government determines the scope and extent of the discussions - Discussions must be
 - Meaningful - the contracting officer must identify deficiencies and significant weaknesses and adverse past performance
 - Equitable and not misleading
- Government might only conduct discussions in writing – with no oral communication whatsoever
- Government cannot disclose information or pricing from another proposal

Bargaining

“Bargaining includes persuasion, alteration of assumptions and positions, give and take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract” (FAR 15.306(d))

The Government decides the extent of bargaining, if any, that will occur

Competitive Commercial Items and Design-bid-build construction

Generally - Bargaining is not extensive or common in these procurements

The federal government may dictate:

- The Contract type – usually FFP, or FFP with EPA
- The Period of Performance
- The minimum performance requirements

Competitive Commercial Items and Design-bid-build construction

The federal government may dictate:

- Materials and supplies to be used or delivered
- Delivery and completion dates and requirements
- Minimum qualifications for key personnel
- Method of pricing
- Frequency of payment
- Wages and benefits paid to employees

Competitive Commercial Items and Design-bid-build construction

- All offerors are usually required to propose on the same detailed requirement - Government compares “apples to apples”
- Commercial Item contracts generally include terms, conditions and requirements that are consistent with customary commercial practice
- Construction contracts have detailed design specifications

Competitive design/build, R&D, and other non-commercial procurements

- Generally less likely that award will be made on initial proposals - discussions are more likely
- Solicitation may not dictate every specific detail - government might compare “fruit to fruit” rather than “apples to apples”
- Government may request “other than certified cost or pricing data” to help with negotiations

Competitive design/build, R&D, and other non-commercial procurements

- Solicitation may ask offeror to propose solutions which may later be subject to negotiations and bargaining
- Government may seek ideas and expertise from offerors
 - BE CAREFUL. If ideas require relaxation of strict minimums, solicitation amendment may be necessary in order for government to accept the idea
 - Read solicitation carefully to determine what is and is not flexible. Get clarification on this before proposal due date

Competitive design/build, R&D, and other non-commercial procurements

- Government still may dictate the contract type and method of pricing
 - However - Incentive Contracts, Cost Reimbursement Contracts, or Time and Material Contracts may be used
- Government may be more willing to engage in Bargaining

sole source / non-competitive

- A proposal is sought from only one offeror
- Decision to sole source must be fully justified under FAR 6.3 (examples - only one source can meet the requirement, the requirement is urgent and compelling, etc.)
- Government is often more likely to seek and accept ideas and expertise from the offeror
- Government is often more willing to engage in Bargaining

sole source / non-competitive

- Offerors often may have more leverage or bargaining power (the government may not have a good BATNA)
- Government may request pre-negotiation fact finding – sharing and analyzing cost and pricing and related assumptions before negotiations begin
- Government may even require certified cost or pricing data (over \$2 million) or data other than certified cost or pricing data

Post Award Negotiations

Post Award negotiations – Government's Goals and Motivations

- Get the user exactly what they need when they need it
- Do the right thing and be fair
- Obtain Fair and Reasonable pricing on changes
 - They take their fiscal duties very seriously
 - Stay within appropriated funding limits
- Be able to sufficiently document the need for change and any associated price adjustment
 - There is significant oversight and audits on contract administration files

Negotiating - Requests for Equitable Adjustments (REAs)

REA – a Request for Equitable Adjustment seeks additional money or additional time based upon specific clauses in a contract

Examples of such clauses include:

- Changes Clause
- Suspension of Work Clause / Stop Work Clause
- Differing Site Condition Clause

Negotiating - Requests for Equitable Adjustments (REAs)

Contractor should be prepared to discuss and present information on both entitlement, and quantum

- **Entitlement** - Does the request have merit? Is the Contractor entitled to any additional time or any additional money under the contract clauses?
- **Quantum** – how much additional time or additional money is the contractor entitled to receive?

Negotiating - Requests for Equitable Adjustments (REAs)

Entitlement -

- Under the Changes Clause – whether the Government expressly or constructively changed the contract , whether the contractor complied with any notice requirements, whether the change increased the cost or time of performance.
- Under the Suspension of Work/ Stop Work clauses - whether the government stopped, delayed or otherwise interfered with work performance or efficiency
- Under Differing Site Condition Clause - whether actual and unknown physical conditions differed materially from the conditions indicated in the contract or from conditions that would ordinarily be encountered.

TIP – Help the government justify and document!

Negotiating - Requests for Equitable Adjustments (REAs)

Quantum you may need to negotiate and come to agreement on:

Additional money –

- The dollar amount incurred (source documents),
- Whether the costs were allocable to the contract,
- Whether the costs were allowable under the contract (FAR 31.205)
- The appropriate credits for original work not performed

Additional time

- The amount of non-excusable delay, non-compensable excusable delay, and compensable excusable delay (time impact analysis)

Negotiating Claims and disputes using ADR

- Government policy is to try and resolve all contractual issues in controversy at the Contracting Officer level. Agencies are required to use ADR to the maximum extent practicable. (FAR 33.204)
- We strongly recommend this be the contractor's policy as well !
 - less expensive
 - less time consuming
 - more flexibility on the resolution (more creative, sensible and efficient)
 - “the devil you know” makes the decision

Negotiating Claims, disputes using ADR

Mediation – negotiation with assistance from a neutral third party. The Neutral is often both an expert in helping people negotiate and a subject matter expert. However, the Neutral has no decision making authority.

Mini-trials – parties present the issues, positions and evidence to a Neutral and to Senior Principals – one from each party. The Principals must have “actual authority” to bind their party to a settlement. After the presentations the Neutral and the Principals attempt to reach resolution.

Non-binding Outcome prediction – each party makes presentations on the issues, positions, and evidence to an Arbitrator. The Arbitrator issues a non-binding opinion on the merits. This is used to give parties an idea of how the issue might be decided by a board or court and to help the parties move toward resolution.

Key concepts for Price Negotiations

Negotiating Price – Definitions

- **Cost and Price are not the same**
 - Contract Costs – the monetary measures of the capital and labor required to complete a contract. It can include cash expenditures, expense accrual (obligation to pay in future – ex. pensions), and draw down of inventory
 - Contract Price – the amount that the Government will pay the prime contractor for meeting the contract requirements. It includes the Contract Costs plus any fee or profit applicable to the contract
- **Price reasonableness and Price Realism are not the same**
 - Price Reasonableness - evaluates whether a price is too high
 - Price Realism – evaluates whether a price is too low, often used to determine if the requirement is understood

Negotiating Price –

- Understand the risks associated with the contract type (FAR Part 16)
 - Fixed Price
 - Cost Reimbursement
 - Time and Materials
- Know when price or cost breakdowns are required and be prepared to provide them
 - Data other than cost or pricing data – when CO believes it is necessary (ex. to determine price reasonableness, cost realism, etc.)
 - Certified cost or pricing data – procurements over \$2 million unless an exception applies (example - Commercial items, adequate price competition)

Negotiating Costs - cost reimbursement

Issues that might be discussed or negotiated:

- Cost reasonableness – the reasonableness of individual cost elements when certified cost or pricing data or other than certified cost or pricing data are required
- Cost realism – government evaluation of an offeror’s probable cost of accomplishing the solicited work
 - Government may believe the probable cost is different than the offerors proposed cost and may adjust for evaluation purposes (actual costs get paid)
 - Probable cost is what the contract performance should cost assuming reasonable economy and efficiency

Resources on Negotiating Price and cost

- FAR 15.4
- Other resources- DOD Contract Pricing Reference Guides [Contract Pricing Reference Guides \(CPRG\) | www.dau.edu](https://www.dau.edu/contract-pricing-reference-guides-cprg)
 - Volume 1 - Price analysis
 - Volume 2 - Quantitative Techniques for Contract Pricing
 - Volume 3 - Cost analysis
 - Volume 4 – Advanced Issues in Contract Pricing
 - Volume 5 - Negotiation Techniques

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resources

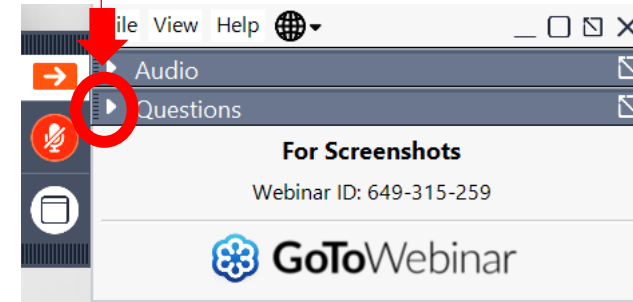
- Federal Acquisition Regulation - Acquisition.gov:
<https://www.acquisition.gov/>
- SAM.gov website - [SAM.gov | Home](#)
- Wisconsin Procurement Institute
 - Phone: 414-270-3600
 - www.wispro.org

QUESTIONS?



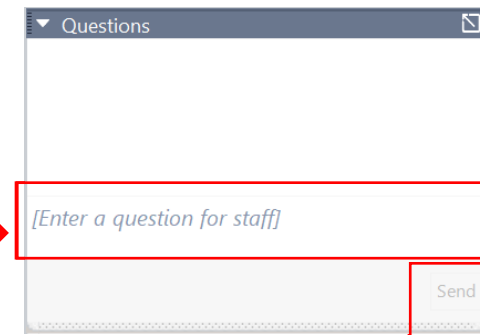
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UPCOMING TRAINING - EVENTS

CYBER FRIDAY LIVE WEBINAR SERIES

Cyber Friday is a series of one-hour webinars focusing on critical topics for DOD contractors and subcontractors in cyber security, data security, and CMMC. Attendees receive 1 CPE credit for attending.

- **June 21**, 3.1.2 Security Awareness Training, Role-Based Training, and Insider Threat Training
- **July 19**, 3.1.3 Audit and Accountability Policy, Log Review Procedure
- **August 23**, 3.1.4 Configuration Management Policy, Change Request Process, Baseline Configurations
- **September 20**, 3.1.6 Incident Response Policy, Incident Response Plan
- **October 18**, 3.1.7 System Maintenance Policy
- **November 22**, 3.1.8 Media Control Policy, Media Destruction Policy and Personnel Security
- **January 24**, 3.1.11 Risk Assessment Policy, Security Assessment Reports

EMERGING ISSUES WEBINAR SERIES

This series is intended as an information tool and resource for contract managers and those with a compliance function. Attendees receive 1 CPE credit for attending.

- **June 20** – Vetting and Securing Your Supply Chain
- **July 25** – Beyond contracts: Conducting Business with the Federal Government
- **Aug 22** – Regulation Making – The Process and the Important Role Businesses Play
- **Sep 19** – Industry 4.0 – The Next Generation of the DIB
- **Oct 24** – Innovation – What Does Innovation Look Like from DoD’s Perspective?
- **Nov 21** – The Critical Role Your Accounting System Plays in SBIR/STTR Success

18th Annual Wisconsin Government Opportunities Business Conference (GOBC)

In Partnership with Wisconsin's Military Installations

June 20

Volk Field ANGB

July 10

Truax Field

GOBC will provide you the opportunity to gain insights into:

- *COFFEE with the COMMANDER*
- Current operations and priorities at Wisconsin's Federal and State government agencies and military facilities
- Connecting with agency and installation leadership, operational staff and buyers
- Locating and bidding on current and future procurement opportunities
- Resources available to assist your business in winning government prime and subcontracts

...More information and registrations at wispro.org/events

- Save the Date -



**The
Contracting
Academy**

*Developing and Growing
Government Contractors*

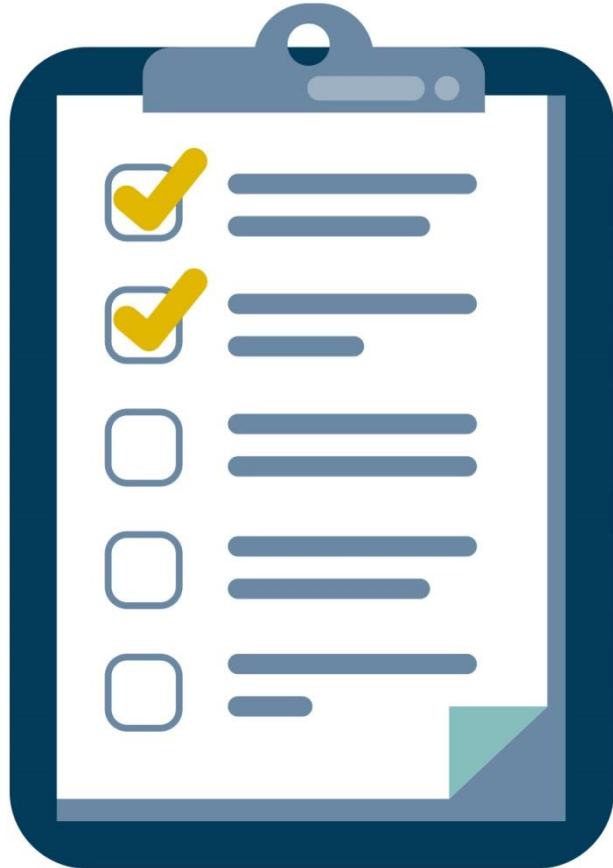
Dec 10

Virtual | 9:00 am - 4:00 pm

The Contracting Academy (TCA) is an opportunity for businesses to grow their technical knowledge of contracting with Federal Government, State/Local Government, and Government Prime Contractors. The series of workshops will benefit established businesses looking to grow and develop their government sales.

...More information and registrations at wispro.org/events

SURVEY



June 12, 2024

CONTINUING PROFESSIONAL EDUCATION



This webinar is eligible for 1 CPE credit.
For a certificate of this credit please contact:

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