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# **Acquisition Hour: Flow-Down Clauses: Management and Responsibilities for Federal Contractors**

**October 9 | Noon – 1:00 pm**

**Presented by:**

**Carol Murphy, Wisconsin Procurement Institute**

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# Webinar Etiquette

## PLEASE

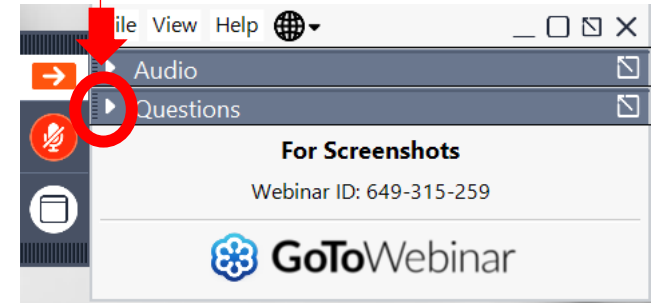
- Log into the GoToWebinar session with the name that you registered with online
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  - We will share the questions with our guest speaker who will respond to the group

## THANK YOU!



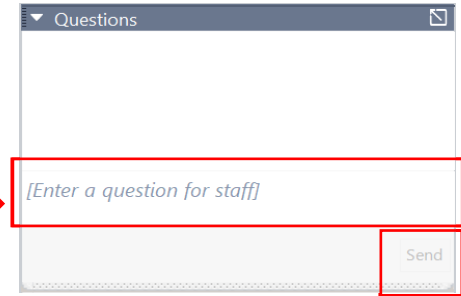
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The APEX Accelerators program, under management of the Department of Defense (DOD) Office of Small Business Programs (OSBP), plays a critical role in the Department's efforts to identify and engage with a wide range of businesses entering and participating 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
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- *Technology Innovation Center*

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- *Dane County Latino Chamber of Commerce*
- *Wisconsin Manufacturing Extension Partnership (WMEP)*
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## ■ CAMP DOUGLAS

- *Juneau County Economic Development Corporation (JCEDC)*

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- *Western Dairyland*

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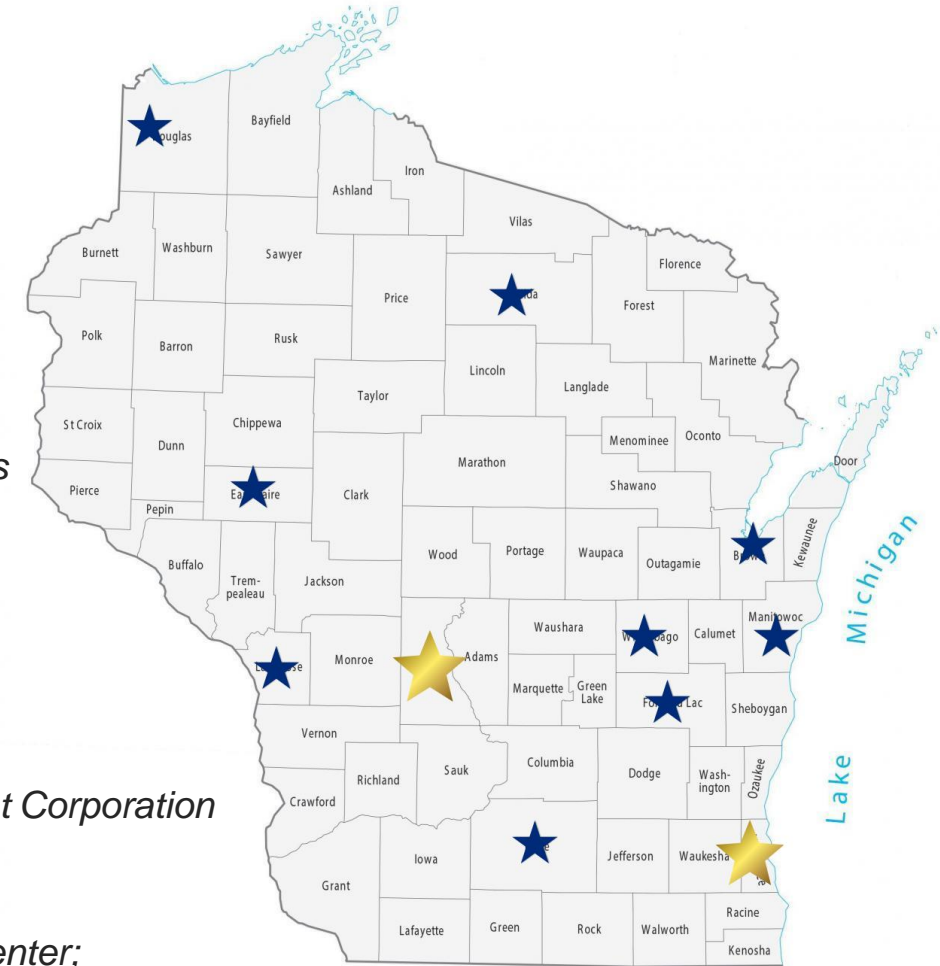
- *Progress Lakeshore*

## ■ OSHKOSH

- *Greater Oshkosh Economic Development Corporation*

## ■ SUPERIOR

- *Small Business Dev Center; UW Superior*



# APEX ACCELERATORS

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## 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

- What are Flow Down Clauses
- How to Determine if a Clause Flows Down
- Method to Track Clauses
- Commercial Item Requirements
- Sample Subcontract Language



# WHAT ARE FLOW DOWN CLAUSES?

- Federal Acquisition Regulation (FAR) clauses included in Government contracts that prime contractors are required to flow down to their subcontractors in their subcontracts
- Agency supplemental regulations also include clauses with flow down requirements
- Flow Down Clauses can significantly impact the obligations and risk of performing a subcontract

# WHAT IS A SUBCONTRACT?

FAR 44.101

“Subcontract” means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract, including purchase orders, and changes and modifications to purchase orders

“Subcontractor” means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor



# HOW DO YOU KNOW WHAT CLAUSES FLOW DOWN

- The FAR clause itself usually states if the clause flows down
- Flow down can be mandatory, non-mandatory (suggested), or to be considered
- Prime contractor may need to flow down the entire clause or the substance of the clause

# WHY DO FLOW DOWNS MATTER?

## For Prime Contractors:

- Prime Contractor is responsible for the entire contract including the actions of their subcontractors
- Manage/allocate performance uncertainties and risk

# WHY DO FLOW DOWNS MATTER?

## For Subcontractors:

- Need to know how FAR requirements will impact their costs
- May need to flow down FAR clauses as well to their subcontractors/suppliers
- Minimize exposure to prime contractor risks
- Ensure company can meet compliance obligations

# FLOW DOWN REQUIREMENTS

- Flow down requirements depend on subcontract type and dollar value
- The entire prime contract should not be flowed down to the subcontractor

# DRAFTING FLOW DOWNS

- Some clauses must be flowed down verbatim
  - “Contractor shall include this clause”
  - “Contractor shall include the terms of this clause”
- Some clauses may be modified
  - “Contractor shall include the requirements of this clause”
  - “Contractor shall include the substance of this clause”

# NON-MANDATORY FLOW DOWNS TO INCLUDE

- **Termination for Convenience Clause** (FAR 52.249-x) – Allows prime to terminate subcontract should the Government terminate the prime contract. If prime has no right to terminate subcontract could result in costly breach of contract
- **Changes Clause** (FAR 52.243-x) – Allows prime to flow Government changes to the subcontractor. Prime must be able to modify subcontract unilaterally to match the scope of the Government change
- **Disputes Clause** (FAR 52.233-1) – Puts subcontractor on notice of disputes process and requires subcontractor to keep working pending a dispute

# FAR CLAUSE DATES

- The Prime Contractor needs to flow down the version of the clause that is in their contract
- If the FAR is updated between the award of the prime contract and the signing of subcontracts, the original contract clause is flowed down



# STEPS AFTER RECEIPT OF CONTRACT AWARD

- Generate an electronic file of the full text of all clauses listed in the contract including the effective date
- Look up each clause to determine if it flows down to the subcontractor
- Note if any dollar thresholds apply
- Prepare contracts with subcontractors including all flow-down clauses

# STEPS AFTER RECEIPT OF CONTRACT AWARD

- Use Excel to set up a list of all clauses, include effective date of the clause and if an alternate was included. Use a new worksheet for each awarded contract
- Indicate if reports are required
- If you have multiple government contracts, maintain a master worksheet of all clauses and secondary worksheets of clauses applicable to each contract

CLAUSE #	TITLE	THRESHOLD	CLAUSE/ PROVISION	REFERENCE/ FULL TEXT	FLOW DOWN	WHEN TO USE						
52.202-1	Definitions (NOV 2013)	over SAT	C	R	C							
52.203-3	Gratuities (APR 1984)	over SAT	C	R	C							
52.203-5	Covenant Against Contingent Fees (MAY 2014)	over SAT	C	R	C							
52.203-6	Restrictions on Subcontractor Sales to the Government (SEPT 2006)	over SAT	C	R	M	commercial items over the SAT						
52.203-7	Anti-Kickback Procedures (MAY 2014)	over SAT	C	R	M	Over SAT						
52.203-8	Cancellation, Rescission and Recovery of Funds for Illegal or Improper Acti	over SAT	C	R	None							
52.203-10	Price or Fee Adjustment for Illegal or Improper Activity (MAY 2014)	over SAT	C	R	None							
52.203-12	Limitation on Payments to Influence Certain Federal Transactions (OCT 201	over \$150K	C	R	M	Over SAT						
52.203-13	Contractor Code of Business Ethics and Conduct (OCT 2015)	over \$5 M	C	R	M	Over \$5M	period of performance 120 days or more					
52.203-14	Display of Hotline Poster(s) (OCT 2015)	over \$5 M	C	R	M	Over \$5M	CO fill in					
52.203-15	Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (J		C	R	M	All	when funded in whole or in part with Recove					
52.203-16	Preventing Personal Conflicts of Interest (DEC 2011)	over SAT	C	R	M	Over SAT	sol. includ self-employed individual if acquisitic					
52.203-17	Contractor Employee Whistleblower Rights and Requirement to Inform Emp	all over SAT	C	R	M	Over SAT						
52.204-4	Printed or Copied Double-Sided on Postconsumer Fiber Content Paper (M	over SAT	C	R	None							
52.204-7	System for Award Management (OCT 2016)	ALL	P	R	M	All						
52.204-8	Annual Representations and Certifications (JAN 2018)	all over SAT	P	F	None							
52.204-9	Personal Identity Verification of Contractor Personnel (JAN 2011)	All	C	R	M	Access to	when routine access to a federally-controlled					
52.204-10	Reporting Executive Compensation and First-Tier Subcontract Awards (OC	over \$25K	C	R	None							
52.204-13	System for Award Management Maintenance (OCT 2016)	All	C	R	M	All	When 52.204-7 is included					
52.204-14	Service Contract Reporting Requirements (OCT 2016)		C	R	M	All	Over thresholds outlined in FAR 4.1703(a)(2)					
52.204-15	Service Contract Reporting Requirements for Indefinite-Delivery Contracts (OCT 2016)		C	R	M	All	Over thresholds outlined in FAR 4.1703(a)(2)					
52.204-16	Commercial and Government Entity Code Reporting (JUL 2016) [all solicita	All	P	R	None							
52.204-17	Ownership or Control of Offeror (JUL 2016)	All	P	R	None							
52.204-18	Commercial and Government Entity Code Maintenance (JUL 2016)		C	R	None		when 52.204-16 is included					
52.204-19	Incorporation by Reference of Representations and Certifications (DEC 201	All	C	R	None							
52.209-5	Representation by Corporations Regarding an Unpaid Tax Liability or a Felc	Over SAT	P	F	None							



# COMMERCIAL ITEM REQUIREMENTS

***FAR 52.244-6 Subcontracts for Commercial Items*** states the contractor shall insert the following 23 clauses in subcontracts for commercial items (some have additional considerations)

- 52.203-13 Contractor Code of Business Ethics and Conduct
- 52.203-15 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009
- 52.203-17 Contractor Employee Whistleblower Rights
- 52.203-19 Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements

# COMMERCIAL ITEM REQUIREMENTS

- 52.204-21 Basic Safeguarding of Covered Contractor Information Systems
- 52.204-23 Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities
- 52.204-25 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment
- 52.204-27 Prohibition on a ByteDance Covered Application
- 52.204-30 Federal Acquisition Supply Chain Security Act Orders—Prohibition – Alternate I

# COMMERCIAL ITEM REQUIREMENTS

- 52.219-8 Utilization of Small Business Concerns
- 52.222-21 Prohibition of Segregated Facilities
- 52.222-26 Equal Opportunity
- 52.222-35 Equal Opportunity for Veterans
- 52.222-36 Equal Opportunity for Workers with Disabilities
- 52.222-37 Employment Reports on Veterans
- 52.222-40 Notification of Employee Rights Under the National Labor Relations Act

# COMMERCIAL ITEM REQUIREMENTS

- 52.222-50 Combating Trafficking in Persons – Alternate I
- 52.222-55 Minimum Wages for Contractor Workers under Executive Order 14026
- 52.222-62 Paid Sick Leave Under Executive Order 13706
- 52.224-3 Privacy Training – Alternate I
- 52.225-26 Contractors Performing Private Security Functions Outside the United States
- 52.232-40 Providing Accelerated Payments to Small Business Subcontractors
- 52.247-64 Preference for Privately Owned U.S.-Flag Commercial Vessels

# COMMERCIAL ITEM REQUIREMENTS

(d) The Contractor shall include the terms of this clause, including this paragraph (d), in subcontracts awarded under this contract.



# SAMPLE SUBCONTRACT LANGUAGE

## INCORPORATION OF FAR CLAUSES.

The Federal Acquisition Regulation (FAR) clauses referenced below are incorporated herein by reference, with the same force and effect as if they were given in full text, and are applicable, including any notes following the clause citation, during the performance of this Contract. If the date or substance of any of the clauses listed below is different than the date or substance of the clause actually incorporated in the Prime Contract referenced by number herein, the date or substance of the clause incorporated by said Prime Contract shall apply instead.

# SAMPLE SUBCONTRACT LANGUAGE-DEFINITIONS

## GOVERNMENT SUBCONTRACT.

This Contract is entered into by the Parties in support of a U.S. Government Contract.

Definitions as used in the FAR clauses referenced below and otherwise in this Contract:

1. "CONTRACTOR" means the SELLER, as defined in the definitions of this document, acting as the immediate (first-tier) subcontractor to ABC COMPANY.
2. "Prime Contract" means the contract between ABC COMPANY and the U.S. Government or between ABC COMPANY and its higher-tier contractor who has a contract with the U.S. Government.

# SAMPLE SUBCONTRACT LANGUAGE-DEFINITIONS

3. "Contract" means this Contract.

4. "Subcontract" means any contract placed by the CONTRACTOR or lower-tier subcontractors under this Contract.

# SAMPLE SUBCONTRACT LANGUAGE-NOTES

## NOTES.

1. Substitute "ABC COMPANY" for "Government" or "United States" as applicable throughout this clause.
2. Substitute "ABC COMPANY Procurement Representative" for "Contracting Officer", "Administrative Contracting Officer", and "ACO" throughout this clause.
3. Insert "and ABC COMPANY" after "Government" or "Contracting Officer", as appropriate, throughout this clause.
4. Insert "or ABC COMPANY" after "Government" throughout this clause.

# SAMPLE SUBCONTRACT LANGUAGE-NOTES

5. Communication/notification required under this clause from/to the CONTRACTOR to/from the Contracting Officer shall be through ABC COMPANY.
6. "Contracting Officer" shall mean the U.S. Government Contracting Officer for ABC COMPANY's government prime contract under which this Contract is entered.

# SAMPLE SUBCONTRACT LANGUAGE

- 52.225-9 BUY AMERICAN ACT – CONSTRUCTION MATERIALS (MAY 2014)
- 52.225-13 RESTRICTIONS ON CERTAIN FOREIGN PURCHASES (JUNE 2008)  
(In paragraph (a), see Notes 5 and 6.)
- 52.234-1 INDUSTRIAL RESOURCES DEVELOPED UNDER TITLE III,  
DEFENSE PRODUCTION ACT (SEPT 2016) (See Note 2.)
- 52.242-13 BANKRUPTCY (JUL 1995) (See Note 2.)
- 52.242-15 STOP-WORK ORDER (AUG 1989) (See Notes 1 and 2.)

# SAMPLE SUBCONTRACT LANGUAGE

## AMENDMENTS REQUIRED BY PRIME CONTRACT.

CONTRACTOR agrees that upon the request of ABC COMPANY it will negotiate in good faith with ABC COMPANY relative to amendments to this Contract to incorporate additional provisions herein or to change provisions hereof, as ABC COMPANY may reasonably deem necessary in order to comply with the provisions of the applicable prime contract or with the provisions of amendments to such prime contract. If any such amendment to this Contract causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the Work under this Contract, an equitable adjustment shall be made pursuant to the “Changes” clause of this Contract.

# SAMPLE SUBCONTRACT LANGUAGE

## FAR FLOWDOWN CLAUSES

### REFERENCE TITLE

1. The following FAR clauses apply to this Contract:
2. The following FAR clauses apply to this Contract if the value of this Contract equals or exceeds \$10,000:
3. The following FAR clauses apply to this Contract if the value of this Contract equals or exceeds \$25,000:
4. The following FAR clauses apply to this Contract if the value of this Contract equals or exceeds \$250,000:

# SUBSTANCE OF FAR CLAUSE INCLUDED

## Anti-Kickback Procedures (Jun 2020)

### *(a) Definitions.*

*Kickback*, as used in this clause, means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided to any prime Contractor, prime Contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

*Person*, as used in this clause, means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

*Prime contract*, as used in this clause, means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.

*Prime Contractor* as used in this clause, means a person who has entered into a prime contract with the United States.

*Prime Contractor employee*, as used in this clause, means any officer, partner, employee, or agent of a prime Contractor.

*Subcontract*, as used in this clause, means a contract or contractual action entered into by a prime Contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.

# SUBSTANCE OF FAR CLAUSE INCLUDED

*Subcontractor*, as used in this clause, (1) means any person, other than the prime Contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract, and (2) includes any person who offers to furnish or furnishes general supplies to the prime Contractor or a higher tier subcontractor.

*Subcontractor employee*, as used in this clause, means any officer, partner, employee, or agent of a subcontractor.

(b) [41 U.S.C. chapter 87](#), Kickbacks, prohibits any person from-

(1) Providing or attempting to provide or offering to provide any kickback;

(2) Soliciting, accepting, or attempting to accept any kickback; or

(3) Including, directly or indirectly, the amount of any kickback in the contract price charged by a prime Contractor to the United States or in the contract price charged by a subcontractor to a prime Contractor or higher tier subcontractor.

(c)

(1) The Contractor shall have in place and follow reasonable procedures designed to prevent and detect possible violations described in paragraph (b) of this clause in its own operations and direct business relationships.

# SUBSTANCE OF FAR CLAUSE INCLUDED

(2) When the Contractor has reasonable grounds to believe that a violation described in paragraph (b) of this clause may have occurred, the Contractor shall promptly report in writing the possible violation. Such reports shall be made to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Attorney General.

(3) The Contractor shall cooperate fully with any Federal agency investigating a possible violation described in paragraph (b) of this clause.

(4) The Contracting Officer may (i) offset the amount of the kickback against any monies owed by the United States under the prime contract and/or (ii) direct that the Prime Contractor withhold from sums owed a subcontractor under the prime contract the amount of the kickback. The Contracting Officer may order that monies withheld under subdivision (c)(4)(ii) of this clause be paid over to the Government unless the Government has already offset those monies under subdivision (c)(4)(i) of this clause. In either case, the Prime Contractor shall notify the Contracting Officer when the monies are withheld.

(5) The Contractor agrees to incorporate the substance of this clause, including this paragraph (c)(5) but excepting paragraph (c)(1) of this clause, in all subcontracts under this contract that exceed the threshold specified in Federal Acquisition Regulation [3.502-2\(i\)](#) on the date of subcontract award.

(End of clause)

# SUBSTANCE OF FAR CLAUSE INCLUDED

## GRATUITIES/KICKBACKS

(a) No gratuities (in the form of entertainment, gifts or otherwise) or kickbacks shall be offered or given by SELLER, to any employee of ABC COMPANY with a view toward securing favorable treatment as a supplier.

(b) By accepting this Contract, SELLER certifies and represents that it has not made or solicited and will not make or solicit kickbacks in violation of FAR 52.203-7 or the Anti-Kickback Act of 1986 (41 USC 51-58), both of which are incorporated herein by this specific reference, except that paragraph (c)(1) of FAR 52.203-7 shall not apply.

(c) SELLER agrees to incorporate the substance of FAR 52.203-7 in all subcontracts under this contract that exceed the threshold specified in FAR 3.502-2(i).



# RESOURCES

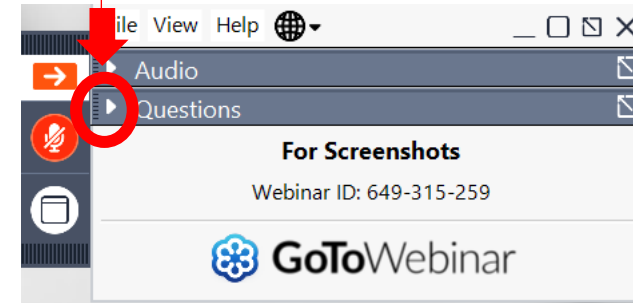
- Federal Acquisition Regulation (FAR) located at Acquisition.gov is:  
<https://www.acquisition.gov/>
- Wisconsin Procurement Institute  
Phone: 414-270-3600 [www.wispro.org](http://www.wispro.org)

# QUESTIONS?



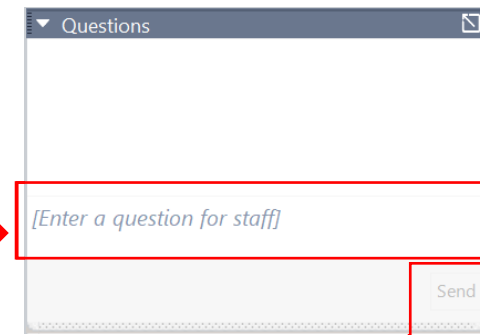
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# UPCOMING TRAINING - EVENTS

# ACQUISITION HOUR LIVE WEBINAR SERIES

The Acquisition Hour webinar series covers a range of topics from market entry, sales growth, small business certifications, compliance, and more. Attendees receive 1 CPE credit for attending.

- **October 15** – Preparing for One-on-One Buyer Meetings
- **October 25** – CMMC Update – October 2024
- **November 12** – Preparing for One-on-One Buyer Meetings
- **November 13** – Responding to Sources Sought Notices and Preparing a Capabilities Statement
- **November 22** – CMMC Update – November 2024
- **December 20** - CMMC Update – December 2024

# 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.

- **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.

- **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

**- Save the Date -**



**The  
Contracting  
Academy**

*Developing and Growing  
Government Contractors*

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**Dec 10**

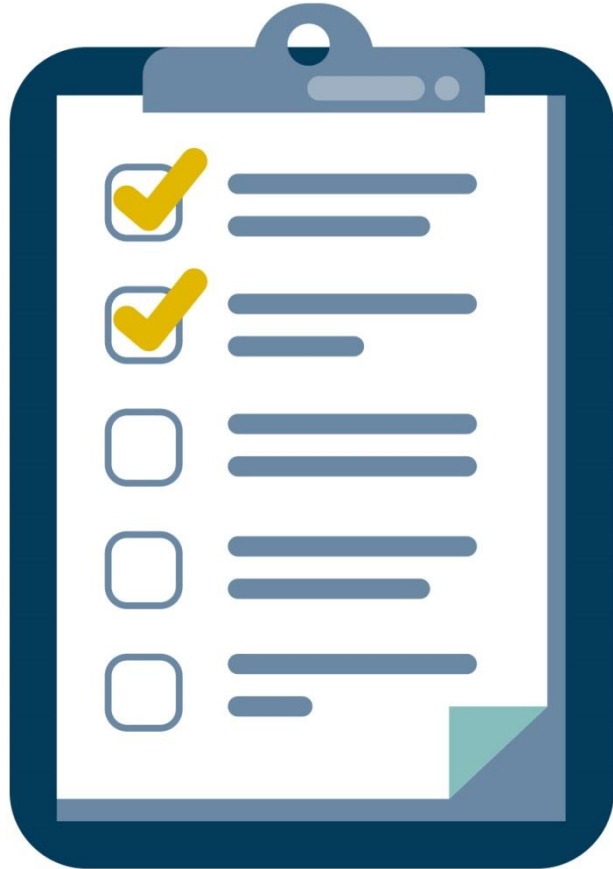
*Virtual | 9:00 am - 4:00 pm*

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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](https://wispro.org/events)**

# SURVEY



October 9, 2024

# CONTINUING PROFESSIONAL EDUCATION



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

**Neelu Patil**

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

# PRESENTED BY

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