

Acquisition Hour

# Mastering Federal Construction Contract Performance

February 19 | Noon – 1:00 pm

Presented by:

Carol Murphy, Government Contract Specialist





*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 and training to all of Wisconsin's 72 counties**

- Individual counseling at our offices, client's facility or virtually
- Small group training – webinars and workshops including Acquisition Hours, Cyber Fridays, Evening FAR sessions, Federal Market Insights and Local Government Sales Opportunities
- Conferences the Governors Marketplace, The Contracting Academy (TCA), WEDCs Small Business Academy, Wisconsin Federal Contractor Forum [DC and in-state], Government Opportunities Business Conference GOBC) with WI military bases, End of Year Federal Contractor Update, Annual DOD Contract Management Update, and more.....

[www.wispro.org](http://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*

- **GREEN BAY**

- *NWTC Startup Hub*

- **LACROSSE**

- *Veterans in Professions*

- **MANITOWOC**

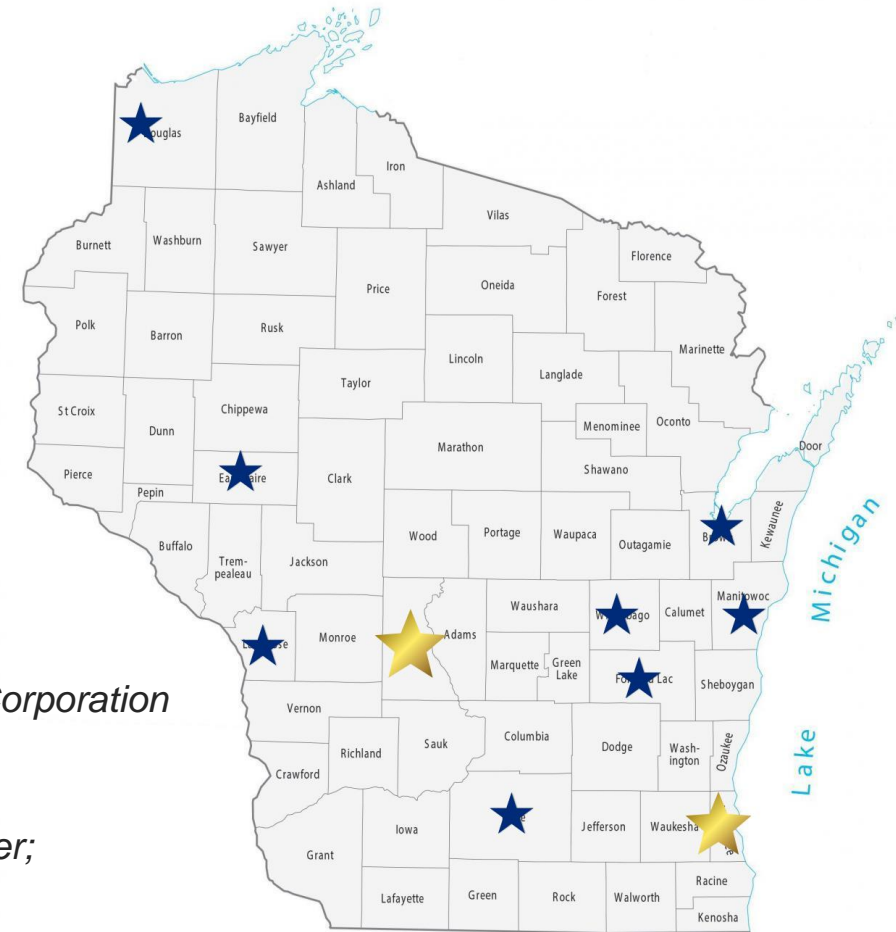
- *Progress Lakeshore*

- **OSHKOSH**

- *Greater Oshkosh Economic Development Corporation*

- **SUPERIOR**

- *Small Business Dev Center; UW Superior*





# 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 (FFP) construction contracts



# 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 – Best Practices

- Read the changes clauses in the contract. Know what is required of the contractor and when. (Federal agencies may 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 Requests For Information (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 – Best Practices

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



# 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 and accurate 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 42.243-4

- 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 contractors 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 – Best Practices

- Know and understand the 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



# 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 a time impact analysis based upon contemporary schedules
  - Explain the contract provisions, clauses and/or other legal authority the contractor is 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
  - Often resolution occurs quickly
  - Contractor can maintain control over the process
  - Resolution possibilities are extensive
  - Less formal venue so it is easier to present the contractor's 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 the contractor's demand, including the detailed REAs previously submitted
  - Include time impact analysis, estimates, invoices, receipts, emails, cell phone texts, and other correspondence
- When the COFD is received, read it carefully. If the contractor still disagrees with the government, they 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 front of retired Federal Court Judge)

# Consequences of Litigation

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



# Resources

- Federal Acquisition Regulation (FAR) - Acquisition.gov: <https://www.acquisition.gov>
- System for Award Management (SAM): <https://sam.gov/>
- Wisconsin Procurement Institute (WPI)  
Phone: 414-270-3600 [www.wispro.org](http://www.wispro.org)

# Upcoming Events

February 19 2025

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# Acquisition Hour

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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.

- ~~February 18 – Federal Contracting: Contract Methods and Types of Contracts~~
- **February 19** – Mastering Federal Construction Contract Performance
- **February 26** – Understanding the US SBA and DOD Mentor Protégé Programs (MPP)
- **March 5** – Marketing Materials for One-on-One Buyer Meetings
- **March 19** – Acquisition Hour: Navigating AI: Practical Tips for Federal Contractors

**...More information and registrations at [wispro.org/events](https://wispro.org/events)**

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# Cyber Friday

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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.

- **February 28** – CMMC: Are You Ready for a C3PAO Assessment?
- **March 28** – CMMC: Federal Cybersecurity Requirements – Who Must Comply?
- **April 25** – CMMC: Maintaining Your CMMC Certification

**...More information and registrations at [wispro.org/events](https://wispro.org/events)**

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# Federal Market Insights

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Federal Market Insights is an informal podcast designed to provide valuable information about the government marketplace for businesses interested in government contracting. Each episode is a concise 30-minute session, scheduled at the end of the week. We review noteworthy items published during the week, delve into key topics, and offer background information and perspectives relevant to the government contracting landscape. Stop by, settle in and take-in the conversation.

- ~~February 14 – Starting Your Federal Contracting Journey: Registering in SAM~~
- February 21 – Getting Started with DoD Contracts: Essential Tips and Information
- February 28 – Navigating DoD Sales: From Regulations to Strategic Planning
- March 7 – Federal Certifications: Beyond Titles to Strategic Value
- March 14 – The Language of Government Contracting: Why Definitions Matter
- March 21 – Federal Information Security: Programs Every Contractor Should Know

**...More information and registrations at [wispro.org/events](https://wispro.org/events)**

# Upcoming Events



**May 14**

*Winning Government Business: Navigating Compliance Risks to Drive Strategic Advantage*  
Milwaukee, WI



**May 15**

*11th Annual DOD Contract Management Update*  
Milwaukee, WI

**...More information and registrations at [wispro.org/events](https://wispro.org/events)**

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# PRESENTED BY

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