



FED GOV CON
Webinar Wednesdays
2019 Series

JSchaus & Assoc.
Washington DC
+ 1 - 202 - 365 - 0598

JENNIFER SCHAUS



& ASSOCIATES



About Our Webinars:

- Every Wednesday;
- Complimentary;
- Recorded;
- YouTube & our Website;
- No Questions

JENNIFER SCHAU S



& ASSOCIATES



About Us:

Professional Services for Federal Contractors

- GSA Sched;
- SBA 8(a);
- Proposal Writing;
- Pricing;
- Contract Administration;
- Business Development

JENNIFER SCHAUS



& ASSOCIATES



Advertise In Our Newsletter:

**Reach 15,700+ Subscribers Includes
Government & Government
Contractors**

Hello@JenniferSchaus.com

JENNIFER SCHAUS



& ASSOCIATES



About Our Speaker:

Devon E. Hewitt

Education:

**Smith College, B.A.,
University of Virginia School of Law, J.D.**

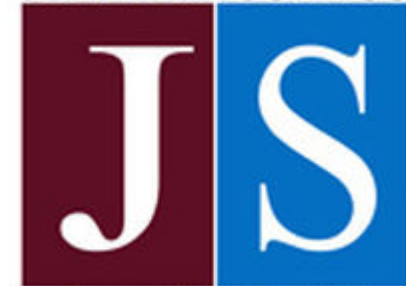
Company Name:

Protora Law PLLC

of Years Federal Gov Con Experience:

25+ years

JENNIFER SCHAUS



& ASSOCIATES



FAR Compliance - What Every Sub Needs To Know

JENNIFER SCHAUS



& ASSOCIATES

2019 – Fed Gov Con Webinar Series - Washington DC
JSchaus & Associates

What is the FAR?

- Federal Acquisition Regulation
 - Governs acquisitions by executive agencies using appropriated funds
 - Requires insertion of various clauses in prime government contracts
 - Many FAR clauses include language requiring a prime contractor to “flow-down” the FAR clause to its subcontractors (mandatory “flow-down” clauses)
 - Other FAR clauses discretionary and choice of whether to “flow-down” clause left to prime contractor’s judgment or subcontractor’s negotiations
- Subcontract is a mixture of a commercial and government contract

2019 – Fed Gov Con Webinar Series - Washington DC
JSchaus & Associates

Are you a subcontractor?

- FAR doesn't include a standard definition of "subcontract" or "subcontractor"
 - The Section 809 panel stated that the FAR and DFARs have 27 "separate, sometimes overlapping, definitions' of "subcontractor"
 - "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"
 - "[C]ompanies that enter into a subcontract—any agreement for the purchase, sale or use of personal property or non-personal services that are, in whole or in part, necessary to the performance of a covered government contract—with an aggregate value that, in any 12-month period, exceeds \$10,000."
 - "[A]ny supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor."

2019 – Fed Gov Con Webinar Series - Washington DC
JSchaus & Associates

Are you a subcontractor? (cont.)

- Whether you are a subcontractor depends on the FAR clause at issue
- Common approach is to consider any contractor that is providing goods and services identified in the prime contract's scope of work a subcontractor
 - Direct charge to contract
 - Subcontractors vs. Consultants
- Contractors that provide goods and services that benefit the company as a whole or enable a company to perform the contract work generally are not considered a subcontractor for the purpose of the “flow-down” process
 - Considered indirect expense
 - Exceptions

2019 – Fed Gov Con Webinar Series - Washington DC
JSchaus & Associates

FAR “Flow-Down” Clauses

- Mandatory vs. Desirable
- Mandatory clauses are those that include language requiring prime contractor to include a “substantially similar” clause in its subcontracts
- FAR includes a “matrix” that shows mandatory/discretionary nature of each FAR clause (48 C.F.R. Subpart 52.301)
- Not all mandatory flow-down FAR clauses are applicable to the subcontract work
 - FAR clauses in prime contract may apply only to contracts above or below certain dollar thresholds
 - FAR clauses may apply to only certain types of contracts (i.e., fixed price, cost reimbursement)
 - FAR clauses may apply only to certain types of work (i.e., supplies vs. services, international vs. domestic etc.)
 - FAR clauses may apply to contracts for “commercial items”
- “Discretionary” clauses can be negotiated

2019 – Fed Gov Con Webinar Series - Washington DC
JSchaus & Associates

FAR Clause “Flow-Down” Process

- Most common method is to include an appendix or attachment to a subcontract identifying FAR “flow-down” clauses
 - Appendix or attachment typically “flows down” all prime contract FAR clauses
 - Prime contractor typically includes “substitution paragraph” in the subcontract indicating that the term “prime contractor” shall be substituted any time the term “agency” or “Contracting Officer” is referenced in a FAR “flow-down” clause etc.
- *Christian Doctrine*
 - Based on case called *G.L. Christian & Assoc. v. United States*, 312 F.2d 418 (Ct. Cl. 1963)
 - FAR clause not physically in prime contract may be incorporated by reference if mandated by law or regulation
 - But certain public policy FAR clauses are incorporated as a matter of law in subcontracts such as clauses relating to affirmative action, labor issues, equal opportunity

2019 – Fed Gov Con Webinar Series - Washington DC
JSchaus & Associates

FAR Clause “Flow-Down” Risks

- Order of Precedence
 - FAR Order of Precedence clause
 - Order of Precedence clause in body of contract will effect outcome if the provisions of a FAR “flow-down” clause in an attachment conflicts with a provision in body of subcontract
 - Disputes clause
 - Changes clause
 - “Data Rights” clauses
 - Termination clauses

2019 – Fed Gov Con Webinar Series - Washington DC
JSchaus & Associates

Sub Contractor Best Practices

- Reject blanket statements or all flow-down approach
- Ask for list of prime contract “flow-down” clauses; don’t accept vague references in subcontract
- Ensure that general substitution paragraph includes “as applicable” language
- Include IP/audit/government property exceptions to general substitution paragraph
- Strike those clauses clearly inapplicable to the work
- Negotiate language of discretionary FAR clauses “flowed-down”
- Identify potentially inconsistent subcontract provisions



THANK YOU!
JSchaus & Assoc.
Washington DC
hello@JenniferSchaus.com
www.JenniferSchaus.com
+1-202-365-0598

Speaker: Devon E. Hewitt

Email: dhewitt@protoraelaw.com

Phone: 703-942-6746

