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RESPONDING TO CORONAVIRUS: CONCERNS FOR GOVERNMENT CONTRACTORS

Presenters:

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Welcome



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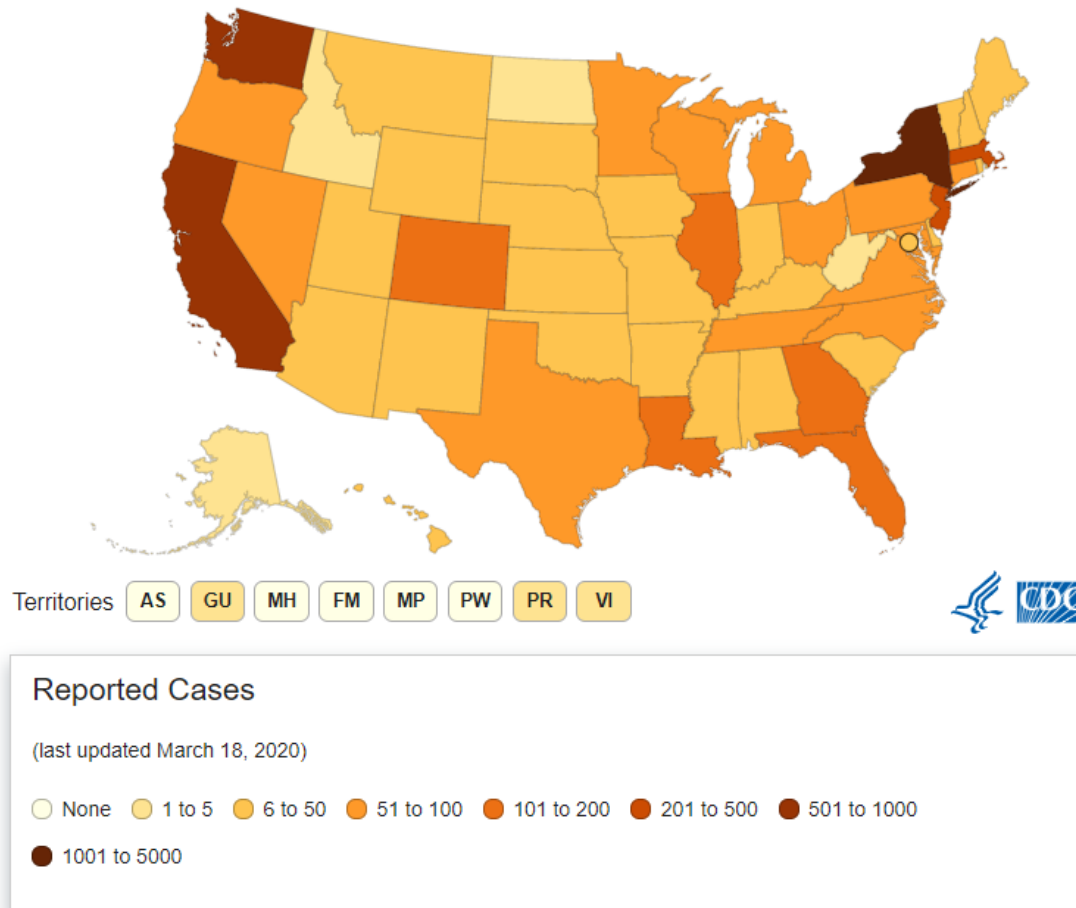
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The background of the slide is a dark blue field filled with a complex, interconnected network of glowing blue lines and dots. These lines and dots form various geometric shapes, primarily triangles, creating a sense of depth and connectivity, reminiscent of a molecular structure or a digital network map.

CURRENT STATE OF PLAY

U.S. Confirmed COVID-19 Cases



Over 7,000
confirmed U.S.
cases – 97 deaths

Sources: Coronavirus COVID-19 Global Cases by Johns Hopkins CSSE (last updated: March 18, 2020)
Centers for Disease Control and Prevention (last updated: March 18, 2020)

Global Statistics

✓ **Total Confirmed Cases: 211,853**

- China: 81,102
- Italy: 35,713
- Iran: 17,361
- Spain: 13,910
- Germany: 11,302

✓ **Total Deaths: 8,724**

✓ **Total Recovered: 83,188**




Remember that the numbers are changing rapidly, as increased availability and use of test kits uncover additional cases.

Source: Coronavirus COVID-19 Global Cases by Johns Hopkins CSSE (last updated March 18, 2020)

Government Response

- DOD travel restrictions in place for service members, civilians, and families assigned to DOD installations.
 - Travel restriction halts all official domestic travel for military members.
 - Service members to authorize local leave only.
 - Exceptions may be granted for mission-essential travel.
- NASA personnel told to telework.
 - Two personnel tested positive causing mandatory telework at two facilities.
 - Other NASA employees were encouraged to work remotely if they can.
 - March 17 – All NASA employees and contractors moved to mandatory telework. Mission-essential personnel continue to be granted access onsite.
- State and local governments have issued a variety of restrictions.
 - Some are orders, *e.g.*, San Francisco (violation of order punishable as criminal misdemeanor).
 - Some are recommendations, *e.g.*, Pennsylvania (non-essential businesses are “strongly urged” to cease operations), Orange County (most businesses to remain open while practicing social distancing).



GOVERNMENT CONTRACTS ISSUES

State/Local vs. Federal Requirements

- Many state & local governments have issued guidance.
 - Variation in mandatory language, exemptions and definitions of essential services.
- Federal customers may require performance.
 - DFARS 252.237-7023 requires contractor to provide a written plan for performing essential services during periods of crisis.
 - Pre-emption of state/local restrictions should not be assumed.
- Recommendations:
 - Review state/local requirements closely to determine whether & how they apply.
 - Review contracts to determine whether they identify essential services.
 - Seek guidance from state/local authorities about applicability of orders/guidance.
 - Seek guidance from contracting officer about exemption from state/local restrictions.

Protections Against Termination for Default

- ✓ For cost reimbursement contracts, FAR 52.249-14 states that a contractor may not be found in default for “causes beyond the control and without the fault or negligence of the Contractor.”
 - ✓ Examples include epidemics and quarantine restrictions.
 - ✓ Under the case law, the contractor has the burden of showing that it attempted to mitigate or avoid the situation. If mitigation or avoidance is not possible, the contractor must show how the epidemic or quarantine affected its ability to perform.
 - ✓ Subcontractor failures to perform are also covered so long as (1) the cause was beyond the control of both contractor and subcontractor and (2) contractor did not fail to follow an order by CO to purchase supplies from another source.
- ✓ For fixed price contracts, FAR 52.249-8(g) states that in the event of an excusable delay, any termination for default will be converted to a termination for convenience, and the contractor is not responsible for excess procurement costs.
- ✓ Contracting officer must set a new schedule, which must be reasonable. When the end date of an excusable delay event is unknown, the contractor may have to wait to establish a new schedule.

Avoiding Termination: Practical Tips

- Confer with Contracting Officer and program often.
 - Ensure communications are well documented.
- Negotiated schedule adjustments will always be better.
- Keep an eye on supply chain threats.
- Excusable delay is likely to result in an adjustment to the contract schedule but will NOT necessarily result in an increase to contract cost or price.

Recovery of Increased Costs

- Excusable delay provisions do not directly allow for recovery of increased costs.
 - Cost reimbursement contracts would still allow for reimbursement of costs, but fee may be affected.
 - Fixed price contracts or contracts with incentive fees will not be adjusted for increased costs automatically.
- When might a contractor recover increased costs?
 - Constructive acceleration
 - Government issued stop-work order
 - Government caused delay
 - Government Delay of Work Clause

Prioritization of Defense Needs

- Defense Priorities and Allocation System
 - System of rating and assigning precedence to orders in tiers to ensure government's most critical needs are met.
 - Requires that rated orders placed under contracts or orders are given priority over all other contracts or orders.
 - DPA authority has been delegated to agencies in different forms in the past, including DOD, DHS, and Commerce.
 - Most recently delegated to HHS to allow priority rated orders for “health resources.”
 - Contractors may see DPA have an effect in at least two ways:
 - If contractor produces health-care products, may receive rated orders from HHS for such products.
 - If supplies or components for products for which contractor has received a rated order become in short supply, may use rated order to fulfill supply chain requirements.
 - Provide prompt notice if unable to fulfill a rated order.

Litigation and Protests

- Many courts are continuing trials and hearings
 - Monitor court websites
- Court of Federal Claims is open but is restricting access to the building
- GAO is currently open and operating as normal
 - Can likely expect any scheduled hearings to be conducted telephonically
- In the event of a GAO shutdown, procedures would likely be similar to a government shutdown
 - Protests and filings due during shutdown would be due when GAO reopens
- If an agency shuts down while GAO remains open, GAO likely will provide an extension for the agency report and record if requested, but the 100-day protest deadline will still apply
 - Any closures would have the largest effect on protests of classified procurements, where the record may be available only at a government facility

Mission Essential Services Clauses

- DPAP Letter dated March 5, 2020, reminded CO's to include provisions at DFARS 252.237-7024 and -7023 in solicitations in support of mission essential functions.
- DFARS 252.237-7024 may also be in existing contracts
 - Requires offeror to provide a written plan describing how it will perform essential government services listed in the contract during periods of crisis.
 - Plan is to include, among other things, the “challenges associated with maintaining essential contractor services during an extended event, such as a pandemic that occurs in repeated waves.”
- DFARS 252.237-7023 defines essential contractor services to include “support of vital systems, including ships owned, leased, or operated in support of military missions or roles at sea; associated support activities, including installation, garrison, and base support services; and similar services provided to foreign military sales customers under the Security Assistance Program.”

How Should Contractors Respond?

- Social Distancing.
 - Telework and facility closures.
 - May not be possible for classified contracts, manufacturing, or base support.
 - Shifts/staggered work hours.
 - Increased cleaning.
 - Expand space to increase physical distance.
 - Use remote capabilities to accomplish training requirements.
- Communicate with government partners.
- Be alert to deadlines and notice requirements, including for excusable delays and DPAS orders.
- Document all costs and other effects on contract performance.

Questions



Visit the Morrison & Foerster Coronavirus Resource Center at
<https://www.mofo.com/special-content/coronavirus>

Thank you!

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Alex Ward's practice covers a full range of government contracts matters, including bid protests, claims, investigations, corporate transactions, and counseling. In addition, he regularly handles federal and state court litigation and alternative dispute resolution involving government contractors.

Alex has served as lead counsel in dozens of bid protests involving military and civilian agency procurements of a wide range of products and services, including all manner of pre- and post-award protests in the GAO, the U.S. Court of Federal Claims, and state tribunals, as well as appeals to the U.S. Court of Appeals for the Federal Circuit and size protests before the SBA's Office of Hearings and Appeals.

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Dan Chudd is a government contracts attorney with significant experience in government contracts litigation and dispute resolution and avoidance. Dan's interest in government contracts was sparked during his clerkship with Judge Mary Ellen Coster Williams of the U.S. Court of Federal Claims. That experience, combined with his in-depth industry knowledge, has made Dan an effective advocate for his clients. In addition, a secondment with a major defense contractor gave Dan valuable insight into the everyday challenges facing government contractors. He draws upon these experiences to develop creative and strategically sound approaches to the myriad issues that his clients face.

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