

Insights

GOVERNMENT'S POWER TO DIRECT PRIORITY OF DELIVERIES

Jan 29, 2021

At the outset of the Covid-19 outbreak in this country, President Trump invoked the Defense Production Act of 1950, as amended, to help combat the virus. In March and April, he issued executive orders under the powers invested in him by the Defense Production Act to help expeditiously acquire equipment and supplies in the fight against Covid-19, including, ventilators, protective equipment and other goods and services to develop and manufacture vaccines. Now, newly elected President Biden has announced his intent to utilize and rely heavily on the powers invested in him by the Defense Production Act in the continuing fight against the virus. Among the tools created by the Act is to give the President and delegated agencies the power to order sellers in the supply chain under government contracts to give priority to performance and deliveries over all of their other contracts. Every business who may be involved in government-related procurements should have a basic understanding of these requirements which are set out in the Defense Priorities and Allocation System (DPAS) regulations found at 15 C.F.R. Part 700.

Under DPAS, the U.S. Government has the right to require a U.S. manufacturer or supplier to give priority to deliveries of purchased goods and services.

Summary of DPAS Regulations

The detailed regulations for the Defense Priorities and Allocation System (DPAS) are found at 15 CFR Part 700.

The U.S. Government has the right to require a U.S. manufacturer or supplier to give priority to deliveries of purchased goods and services. DPAS does not apply to foreign companies.

A priority is established by rated orders. Orders are rated either as DO or DX. DO rated orders have equal priority with each other and take preference over unrated orders. All DX rated orders have equal priority with each other and take precedence over DO rated orders and unrated orders. If a company finds that delivery against an accepted rated order conflicts with the delivery against other accepted rated orders of equal priority status, a company shall give preference to the conflicting orders in the sequence in which they are to be delivered or performed (not to the receipt dates). If a

company is unable to resolve rated order delivery or performance conflicts, a company shall promptly seek special priorities assistance from the appropriate contract officer for guidance.

Mandatory acceptance. With certain exceptions, a company shall accept every rated order received and must fill such orders regardless of any other rated or unrated orders that have been accepted. A company cannot charge higher prices or impose terms and conditions different from comparable unrated orders.

Mandatory rejection. A company shall not accept a rated order if unable to fill the order by the required dates. In that case, the company must inform the customer of the earliest date on which delivery can be made and offer to accept the order on the basis of that date. Scheduling conflicts with previously accepted lower rated or unrated orders are not sufficient reason for rejection. The company shall not accept a DO rated order for delivery on a date that would interfere with delivery of a previously accepted DO or DX rated order. A company shall not accept a DX rated order for delivery on a date which would interfere with delivery of any previously accepted DX rated order.

Optional Rejection. A company may reject a rated order as long as it does not discriminate among customers in the following cases:

1. If the customer placing the order is unwilling or unable to meet regularly established terms of sale or payment.
2. If the order is for an item not supplied or a service not performed by the supplier.
3. If the order is for items produced, acquired or provided only for the company's own use for which no orders have been filled for two years, provided that if, however, the company has sold some of these items it must accept rated orders up to the quantity or portion of production sold within the past two years.
4. If the customer placing the order, other than the U.S. Government, makes the item or performs the services being ordered.

Time for accepting rated orders. Except for orders placed for the purpose of emergency preparedness requirements, a company must accept or reject a rated order in writing within 15 working days after receipt of a DO rated order and within 10 days after receipt of a DX rated order. A company must give reasons in writing for the rejection. If an order is placed for purpose of emergency preparedness, it must be accepted or rejected in writing within the time specified in the rated order. The minimum time that a company may specify for acceptance or rejection is six hours after receipt of the order if the order is issued by an authorized person in response to a hazard that has occurred or twelve hours after receipt of the order issued by an authorized person to prepare for an imminent hazard.

Scheduling. Once a company has accepted a rated order, it must schedule operations, including the acquisition of all needed production items, in a timely manner to satisfy the delivery requirements of each rated order. Companies are required to reschedule unrated orders if they conflict with the performance of a rated order and reschedule DO rated orders if they conflict with the performance of a DX rated order.

If a company has accepted a rated order and subsequently finds that the shipment will be delayed, the company must notify the customer immediately, give the reasons for the delay, and advise of a new shipment date. If notifications are given verbally, a written or electronic confirmation must be provided within one working day of the verbal notice.

Flow down requirements. Companies who received rated orders must in turn place rated orders with their suppliers for the items they need to fill the rated orders. This continues from contractor to subcontractor to supplier throughout the entire supply chain.

Compliance. Willful violation of DPAS obligations is a crime punishable up to a \$10,000 fine or one year in prison or both. The government can also seek an injunction to prohibit the continuance of the violation or to enforce compliance.

Protection against claims. A company shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of the DPAS notwithstanding that such provision or action shall subsequently be declared invalid by judicial or other competent authority.

Record keeping. Suppliers are required to make and preserve for at least three years accurate and complete records of any transaction covered by DPAS. Records must be maintained in sufficient detail to permit determination of whether each transaction complies with the provisions of the DPAS, but the DPAS regulation does not specify any particular method or system to be used.

Communications. General communications concerning DPAS including request for guidance or certification, may be addressed to the Office of Strategic Industries and Economic Security Department of Commerce, Washington, D.C. Telephone: 202-482-4638; email: DPAS@bis.doc.gov.

RELATED CAPABILITIES

- White Collar
- Investigations
- Regulation, Compliance & Advisory

MEET THE TEAM



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