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Defense Production Act use under the Biden Administration: What a stronger pandemic response means for government contractors

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The Biden Administration plans to adopt a more forceful approach to the COVID-19 pandemic, which will likely include use of the Defense Production Act of 1950 (DPA). As we discussed last April, the DPA authorizes the U.S. government to compel prioritized sales and direct industrial production.

A rated order takes priority over pre-existing contractual obligations and must be accepted or rejected by a contractor promptly.

For government contractors that receive orders issued under the DPA, operations and contractual obligations can be disrupted, so it is critical to know your rights and obligations under the statute.

The DPA authorizes the government to issue "rated orders" pursuant to the Federal Priorities and Allocations System (FPAS). To be valid, a rated order must include the required delivery date, the signature of an authorized individual, the rating itself, and the following statement: "This is a rated order certified for national defense use, and you are required to follow all the provisions of the [FPAS] regulation at 45 CFR part 101." A rated order takes priority over pre-existing contractual obligations and must be accepted or rejected by a contractor promptly.

The DPA also provides broad "allocation" authority for the government to direct industrial production to accommodate the performance of rated orders. Allocation orders may require a contractor to reserve materials, services, or facilities; reduce or divert production; or limit the maximum quantity of a material, service, or facility authorized for a specific use.

This allocation authority has not been invoked since the end of the Cold War, but it is still viable and a powerful tool for the government to use when responding to national disasters.

If you receive a rated order, you are generally required to accept the order if it calls for equipment or supplies normally sold by your business and you can meet the delivery requirements. A contractor who receives a rated order must schedule operations, including the acquisition of all needed production items or services, to satisfy the delivery requirements of the rated order.

Critically, the priority ratings extend throughout the entire procurement supply chain. So a contractor "must use rated orders with suppliers to obtain items or services needed to fill a rated order." 45 C.F.R. § 101.35. In other words, a contractor must include the priority rating it received on each successive order it places with subcontractors and downstream suppliers.

The DPA provides immunity from damages and penalties resulting from compliance with its provisions. Specifically, it states, "No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this chapter, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid."

The DPA thus protects government contractors from third-party liability, if their compliance with a DPA rated order means another private contract for supplies is delayed or unfulfilled.

The DPA prohibits government contractors from discriminating against rated orders or allocation orders by charging higher prices or imposing different terms and conditions than for comparable unrated orders, or for materials, services, or facilities covered by an allocation order.

The DPA thus protects government contractors from third-party liability, if their compliance with a DPA rated order means another private contract for supplies is delayed or unfulfilled.

Violation of this provision is punishable by a fine or imprisonment. With room for such liabilities, contractors should prepare to respond to rated or allocation orders promptly.

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