

Implications of COVID-19 on Performing Contracts Subject to the Health Resources Priorities and Allocation System (HRPAS) (45 CFR PART 101)

On March 18, 2020, the President signed an “Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19,” which invoked the President’s authority to shape the domestic industrial base to prepare and respond to national emergencies under the Defense Production Act of 1950 (“DPA”). Please see our related paper discussing the DPA.

The Executive Order determined that health and medical resources needed to respond to the spread of COVID-19 are scarce and critical materials essential to the national defense. The Executive Order delegated to the Secretary of Health and Human Services (“HHS”) the authority to determine the proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials (including applicable services) in the civilian market, for responding to the spread of COVID-19 within the United States.

This paper addresses the existing HHS priorities and allocations regulations, the Health Resources Priorities and Allocations System (“HRPAS”). It is important to note that the Executive Order delegated broad authority to the Secretary of HHS to “issue such orders and adopt and revise appropriate rules and regulations as may be necessary to implement this order.”

What is the purpose of HRPAS?	To ensure the timely availability of all forms of health resources to meet national defense (including emergency preparedness) requirements.
What programs use HRPAS?	Military, Energy, Homeland Security, and Critical Infrastructure Programs, and Emergency Preparedness activities pursuant to the Stafford Act (42. U.S.C. 5195 et seq.).
What is included in “Emergency Preparedness?”	All measures taken to prepare for or minimize the effects of a hazard upon the civilian population; to deal with immediate emergency conditions created by a hazard; and to make emergency repairs to, or the emergency restoration of, vital utilities and facilities.
Who administers HRPAS?	The U.S. Department of Health and Human Services (“HHS”). The Assistant Secretary for Preparedness and Response (“ASPR”) exercises the priorities authorities; the Secretary retains authority for allocations. HHS may also authorize other federal agencies to place priority orders.

How does HRPAS prioritization system work?

An authorized U.S. government agency places “rated orders”:

- A rated order is a prime contract, subcontract, or purchase order issued under HRPAS regulations supporting an approved program.
- Rated orders take preference over all unrated orders as necessary to meet required delivery dates; contractors must reschedule unrated orders if they conflict with performance against a rated order.
- HRPAS regulations establish two levels of priority for rated orders, identified by the rating symbols “DX” and “DO”:
 - All DX rated orders have equal priority and take preference over DO and unrated orders (based on shipment schedule)
 - All DO rated orders have equal priority and take preference over unrated orders (based on shipment schedule)
 - In addition, an HHS Directive regarding priority treatment for a given item takes precedence over any DX-, DO-, or unrated order, as specified in the Directive.

Must I accept a rated order?

U.S. companies are required by law to accept rated orders (absent narrow exceptions) and to provide preferential scheduling even over previously accepted orders if necessary to meet required delivery date(s).

- Once placed, a company must accept or reject a DO-rated order within 15 working days; a DX-rated order within 10 working days; and within 2 days for urgent emergency preparedness orders.
- Mandatory acceptance – a company must accept any rated order for items normally supplied or services normally performed.
- Mandatory rejection
 - A company must reject a rated order for delivery on a specific date that the company cannot meet.
 - But, the company must inform the customer the earliest delivery can be made, and offer to accept the order for that date.
 - Previously accepted unrated or lower rated orders do not provide sufficient reason for rejection.
- Optional Rejection
 - If the ordering customer is unwilling or unable to meet regularly established terms of sale or payment.
 - If the order is for an item not supplied or a service not capable of being performed.
 - If the order is for an item produced, acquired, or provided only for the company’s own use for which no orders have been filled for two years prior to the date of the receipt of the rated order.

- If the ordering customer, other than the U.S. government, makes the item or performs the service being ordered.

How do I treat a rated order?

If a company accepts a rated order, the company must meet the requirements of that rated order, such as delivery date.

- May not discriminate against rated orders in any manner, such as by charging higher prices or by imposing different terms and conditions than for comparable unrated orders.
- Must in turn place rated orders with suppliers for the items needed to fill rated orders.
- Willful noncompliance with HRPAS is a crime.

How does the HRPAS allocation system work?

Allocation authority permits the government to control general distribution of any material in the civilian market when such material is a scarce and critical material essential to the national defense. It includes exercising control of materials, services, and facilities. Similar to priority orders, allocation orders must be accepted.

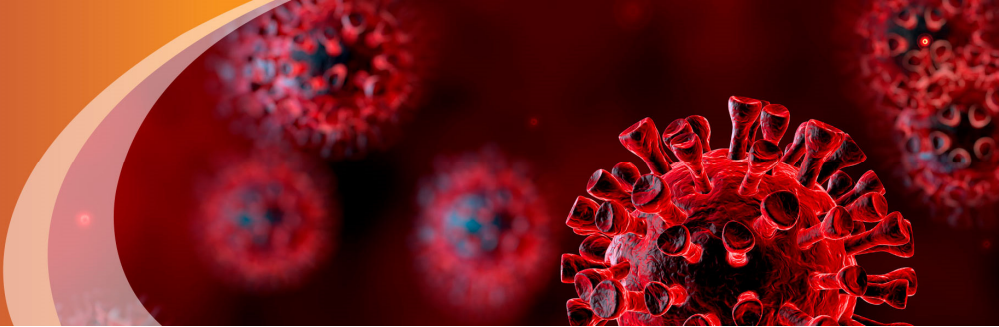
There are three types of allocation actions:

- **Set-aside.** A set-aside is an official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders.
- **Directive.** A directive is an official action that requires a person to take or refrain from taking certain actions. For example, a directive can require a person to: stop or reduce production of an item; prohibit the use of selected materials, services, or facilities; or divert the use of materials, services, or facilities from one purpose to another.
- **Allotment.** An allotment is an official action that specifies the maximum quantity of a material, service, or facility authorized for a specific use to promote the national defense.

What is the government's policy regarding allocations?

It is the Federal Government's policy that allocations authority may only be exercised when there is insufficient supply to satisfy the national defense requirements through the use of priorities authority.

- Allocation authority should not be used to ration materials or services at the retail level.
- Allocation orders will be distributed equitably among suppliers and not require any person to relinquish a disproportionate share of the civilian market.



How do these HRPAS requirements interact with state and local government orders restricting business operations?

Companies should consider engaging with their U.S. government or higher-level contractor customers placing rated orders, their local government agencies responsible for any business restrictions, and their lower-tier subcontractors and suppliers regarding these issues, including:

- Do the state/local restrictions expressly exempt federal contractors? Or federal contractors performing national defense-related work?
- Do the state/local restrictions exempt a category of business such as “essential government functions,” “essential business,” or similar terms that may cover performance under rated orders?
- Does the special priorities assistance available from the HHS resolve any problems the contractor may be facing relevant to the HRPAS?
- Does the state/local government acknowledge the protections afforded companies that comply with HRPAS, such as:
 - 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 the HRPAS or official HRPAS action.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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