

Implications of COVID-19 on Performing Contracts Subject to the Defense Priorities and Allocation System (DPAS) (15 CFR PART 700)

State and local governments have recently begun ordering businesses to take all steps necessary for employees to work remotely from home to the extent possible and to cease activities that cannot be performed at home, with some limited exceptions. As federal government contractors navigate compliance with such orders, they should consider whether they perform any federal government contracts subject to the Defense Priorities and Allocation System (DPAS) and how those federal requirements interact with the state and local government orders.

What is the purpose of DPAS?

To ensure the timely availability of industrial resources to meet national defense and emergency preparedness requirements.

What programs use DPAS?

Military, Energy, Homeland Security, Emergency Preparedness, and Critical Infrastructure Programs.

Who administers DPAS?

The U.S. Department of Commerce, which has delegated authority to place and administer DPAS “rated orders” to:

- Department of Defense (DOD)
- Department of Energy (DOE)
- Department of Homeland Security (DHS) (through its lead agency, Federal Emergency Management Agency (FEMA))
- General Services Administration (GSA)

How does DPAS work?

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

- A rated order is a prime contract, subcontract, or purchase order issued under DPAS 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
- DPAS 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)

Must I accept a rated order?

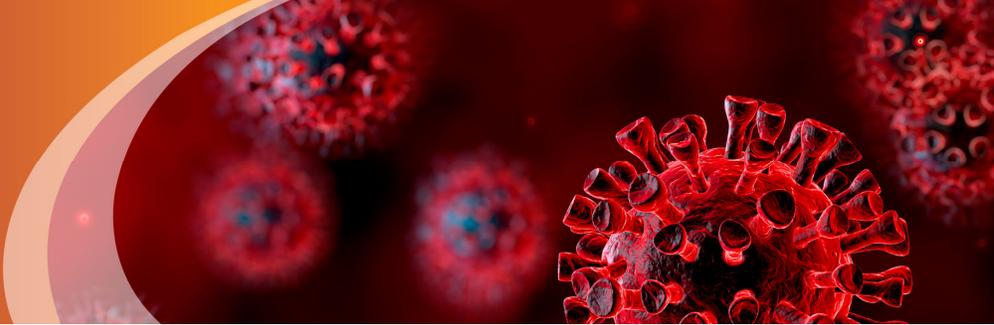
U.S. companies are required by law to accept rated orders (absent narrow exception) and to provide preferential scheduling even over previously accepted orders if necessary to meet required delivery date(s).

- Once placed, a company must accept or reject the rated order within 15 working days (or 6 hours for 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 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 DPAS is a crime



How do these DPAS 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 security-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?
- Contractor may seek special priorities assistance from the Department of Commerce and/or from the Delegate Agencies to resolve any such conflicts. (15 CFR § 700.50, *et seq.*)
- Does the state/local government acknowledge the protections afforded companies that comply with DPAS, 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 DPAS or official DPAS action

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

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