

New Rule Increases Pressure On Homeland Security Contracts

By **Dietrich Knauth**

Law360, New York (August 14, 2014, 7:58 PM ET) -- With a new Bureau of Industry and Security regulation set to increase federal agencies' authority to force contractors to prioritize contracts and purchases related to national security, attorneys warn that companies with homeland security contracts will have to quickly ensure they're able to meet the new expedited delivery requirements.

The BIS, part of the U.S. Department of Commerce, issued a final rule Thursday revising the Defense Priorities and Allocations System by adding new categories and giving the government an option to demand responses from contractors within hours for emergency work. Traditionally, DPAS authority was reserved for defense-related items and services, but the new categories will increase the authority to issue rated orders in connection with homeland security, emergency preparedness and critical-infrastructure protection activities.

The expanded DPAS authority will likely require some additional responsibilities for the companies and agencies most likely to be swept into the new categories, especially the U.S. Department of Homeland Security and its contractors, according to Peter Eyre, an attorney in Crowell & Moring LLP's government contracts group.

"Contractors and subcontractors that traditionally haven't dealt with rated orders are more likely to see them because of this expansion. Companies will need to become familiar with these obligations," Eyre said. "And I suspect that civilian agencies — especially DHS — are going to be figuring out how to use the expanded coverage and authority."

The DPAS system has two methods for redirecting resources toward national security, called "priorities" and "allocations." By using "priorities," agencies can require certain contracts to be given priority over a company's other work to facilitate expedited delivery, according to the rule. Under the "allocations" authority — which has not been used in decades — the government can reserve scarce resources held by its contract partners for the promotion of the U.S. national defense.

Contractors have some ability to accept or refuse a rated order made under the DPAS priorities authority, but the new rule will require them to move much more quickly if they want to reject certain orders. Typically, contractors have 10 or 15 days to respond to an order, but the new rule adds categories of "emergency preparedness," which require responses within six hours, and orders related to an "imminent hazard," which require responses within 12 hours.

Contractors that refuse an order, fail to respond or fail to complete the emergency work can be subject

to injunctions, contractual remedies such as termination for default, referral for suspension or debarment, and, in extreme cases, civil fines and criminal penalties, according to Rick O'Keefe, a partner at Wiley Rein LLP.

"Contracting officers are required to promptly report DPAS violations to the Department of Commerce," O'Keefe said. "That doesn't happen very often, but bad things can certainly happen if you don't "

The new homeland security categories will expand the DHS' ability to use rated orders to expedite work in a broad range of categories, adding to existing authorities used by other agencies, such as Commerce's ability to expedite military aid to Canada and other allies and the U.S. Department of Energy's ability to issue rated orders for nuclear energy or oil production contracts.

Under the new rule, DHS has authority over federal emergency preparedness, mitigation, response and recovery at the federal, state, local and tribal levels; intelligence and warning systems; domestic counterterrorism, including law enforcement; chemical, biological, radiological and nuclear countermeasures; critical infrastructure protection and restoration; and "miscellaneous" homeland security efforts.

Those categories are broad enough that there remains some question about what work will be covered and how the government will use the new authority, O'Keefe said.

"That's going to be an issue that's worked out on a contract-by-contract basis, until individual agencies work out exactly what the boundaries are and what is considered 'critical infrastructure,' for example," O'Keefe said. "One of the things that I've seen over the years is the rather promiscuous use of DPAS. It can be used in situations to create an urgency that really is not justified. It's like if my secretary marked every message with an exclamation mark to try to get me to respond, that's a problem."

Given the scope of the changes, contractors should familiarize themselves with the new rules and gauge their potential impact on their businesses, so that they can spot potential compliance issues and won't be caught flat-footed when they receive a rated order, O'Keefe said.

Major defense contractors should be able to quickly update their systems to account for the expanded DPAS categories and the new emergency response times, but companies that have less experience in U.S. Department of Defense work might have to set up entirely new systems to adapt to the regulation, he added.

"To the extent that the rule brings in new contractors ... some people are going to need to start from scratch or at least have more awareness of what the requirements are," O'Keefe said.

Generally, rated orders don't cause problems for companies, but they have the potential to be disruptive, according to Eyre.

"Most often rated orders do not cause issues, but conflict and tension is most common where there are resource constraints or companies are manufacturing complex items with a long production time," Eyre said. "Over the years the Bureau of Industry and Security has become very experienced at handling and resolving any conflicts and issues that do arise."

The BIS said that it doesn't expect any significant increase in rated orders as a result of the new rule.

“With respect to priorities authority, this rule is not likely to increase the number of priority rated contracts compared to the number being issued currently,” the BIS said in the regulation's introduction. “Therefore, the priorities authorities provisions of this rule are unlikely to have any economic impact.”

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