

Coronavirus Challenges Facing Government Contractors

By **Lisa Himes and Joshua Deitz** (March 12, 2020)



Lisa Himes



Joshua Deitz

As COVID-19 spreads in the U.S. and abroad, government contractors should prepare for likely impacts. Contractors face not only potential disruption of supply chains and loss of personnel, but also the effects of emergency programs such as the Defense Production Act that may place special demands on contractors, particularly for health-related supplies.

Below we discuss key issues and recommendations for government contractors in handling the potential effects of the coronavirus.

Potential Impacts From the Coronavirus

Government contractors may face challenges with interruptions in contract performance, particularly as a result of impacts on the global supply chain and loss of personnel. Both

contractor and government personnel may be impacted by varying degrees by quarantines, travel restrictions, illness and other potential complications. These may delay timelines related to contractor performance and government approval and acceptance.

Government contracts should all contain an excusable delay provision (i.e., Federal Acquisition Regulation 52.249-14 and for commercial contracts, FAR 52.212-4(f)). While the protections are available for excusable delay, including specifically quarantines and epidemics, contractors will need to advise the contracting officer regarding the reasons for the delay and mitigate any potential impacts.

It is also possible that government contractors may encounter suspension^[1] or stop-work orders,^[2] as well as constructive changes.^[3] With the stop-work orders, it is important to comply with the order and notify subcontractors and suppliers. In addition to maintaining a record of the costs and impacts, contractors may want to seek an equitable adjustment for such impacts. As to the constructive changes, among other things, contractors should review their contracts and ensure notification of any costs or schedule impacts.

Defense Production Act Authority

Another key issue with this virus is the president's ability to use the Defense Production Act to ensure that key personal protective supplies (e.g., ventilators, masks), other medical supplies, and medicines are available.

Under the DPA, Title 50 of U.S. Code Section 4501 et seq., the president and the executive agencies to which power has been delegated, have the legal authority to "require that performance under contracts or orders (other than contracts for employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance."^[4]

In addition, the president has the authority "to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense."^[5]

Under the DPA, failure to comply is a criminal violation. Specifically, under Title 50 of U.S. Code Section 4513, "[a]ny person who willfully performs any act prohibited, or willfully fails to perform any act required, by the provisions of this subchapter or any rule, regulation, or order thereunder, shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both."

As a result of the emergency requirements under the DPA, the statute provides liability protection for compliance, stating:

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.[6]

Defense Production Act Delegation

This DPA authority has been delegated to particular executive agencies in different forms through the years, but most recently in Executive Order 13603, Section 201, which delegates authority to place priority rated orders for “health resources”[7] to the U.S. Department of Health and Human Services.[8] It separately provides authority to issue rated orders to other agencies, including the U.S. Department of Defense, the U.S. Department of Homeland Security and the U.S. Department of Commerce.

With regard to health resources, HHS has issued the Health Resources Priority and Allocations System regulations to implement this authority.[9] While HHS can delegate this authority to other executive agencies, to agencies within HHS, and to contractors,[10] HHS has not yet delegated such authority.

Should HHS or other agencies begin to issue rated orders for health resources or other items related to the coronavirus, government contractors must be prepared to respond immediately. This authority allows the government to prioritize production of certain key items that are in short supply, such as personal protective masks, exam gloves, respirators, protective gowns and other items.

Contractors are required to accept and fill every rated order they receive by the delivery date, provide a later delivery date by which they can fill the order, or explain why they cannot fulfill the order.[11] Contractors must respond to accept or reject within applicable time limits — within 15 working days of receiving a DO-rated order, and within 10 working days of receiving a DX-rated order.[12]

Rated orders take priority over unrated orders and commercial orders, even if those orders were placed before the rated order.[13] There are provisions allowing contractors to submit requests for clarifications and questions, and to request adjustments or exceptions and then appeal a denial.[14]

Just as importantly, rated orders must follow specific requirements. The order must (1) state whether it is DO or DX rated (DO-HR and DX-HR for HHS orders); (2) include a required delivery date or dates; (3) provide a written or digital signature from the individual authorized to place rated orders; and (4) include a statement that the order is a rated order under the regulations of the agency issuing the order.[15] While an agency can issue changes to rated orders, an amendment that significantly alters the original production or delivery schedule is considered a new rated order, and would be prioritized accordingly.[16]

Rated orders also flow down through the supply chain. If an agency places a rated order with a contractor, that contractor is required to use that rated order to procure any necessary items or services to fulfill the order from subcontractors.[17] The contractor must label those orders as rated orders to ensure they are properly fulfilled.[18] Subcontractors are then subject to the same requirements and restrictions as the contractor under the rated order.[19] Also, state and local agencies can receive delegated authority to place rated orders, but they are otherwise subject to the priority of rated orders over any state or local emergency ordering provisions.[20]

Strategic National Stockpile

While HHS has not activated or delegated its authority to issue rated orders yet, it has exercised other procurement authority available to it. On March 4, HHS announced that it would use its authority to procure supplies for the Strategic National Stockpile to procure 500 million N95 respirators.[21] The SNS is the “nation’s largest supply of life-saving pharmaceuticals and medical supplies for use in a public health emergency severe enough to cause local supplies to run out.”[22]

Through guaranteed orders, the acquisition is intended to encourage contractors to immediately increase their production of the respirators with a guarantee that they will not be left with excess supplies.[23] This authority, however, allows contractors to fulfill all non-SNS orders before fulfilling SNS orders, essentially a reverse rated order.[24] The solicitation for proposals opened on March 4 and proposals must be received by March 18.[25]

HHS and other agencies have similar authority to carry out procurements outside of the Defense Property Accountability System priority rating system. It will be critical to monitor the particular authority for such orders and ensure appropriate compliance.

Recommendations for Handling Coronavirus Impacts

1. Government contractors should review their contracts to confirm that they contain an excusable delay provision. Contractors should stay in close communication with contracting officers to ensure that all impacts on the project are communicated and confirmed, and take action to mitigate any potential impacts of an interruption in contract performance. In the event of a constructive change, contractors should review their contracts to ensure proper notification of any cost or schedule impacts.
2. With any suspension or stop-work order, contractors will need to immediately comply with the order and notify subcontractors and suppliers. Contractors also should consider whether to seek an equitable adjustment.
3. Contractors should watch for any announcements from federal agencies placing rated orders or utilizing other emergency procurement mechanisms such as the SNS that would affect the normal ordering process and provide opportunities to bid for such proposals.

4. In the event of rated orders, contractors should ensure that their order intake procedures can provide a response in the required timeline, and should create a process to inform other customers that rated orders will take priority over unrated orders. Contractors also must transmit the required designation and language with any such rated orders requiring subcontracting.

5. Contractors also should secure backup sources of supplies and personnel, where possible, and ensure that they have appropriate insurance coverage. Even though the DPA provides immunity from suit, contractors should ensure coverage for any third-party liability suits, including defense costs.

In sum, government contractors should prepare for a variety of potential impacts from the spread of coronavirus. This includes preparation for a slowdown or stop-work notice and for potential emergency orders with significant obligations.

It is important to prioritize and ensure performance of any rated-order contracts and postpone unrated orders from both government and commercial customers. By keeping these recommendations in mind, government contractors can help protect themselves from the impacts of the coronavirus.

Lisa N. Himes is of counsel and Joshua M. Deitz is an associate at Rogers Joseph O'Donnell PC.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] FAR 52.242-14.

[2] FAR 52.242-15.

[3] FAR 52.243-1 et seq.; FAR 52.212-4.

[4] 50 U.S.C. § 4511(a).

[5] Id.

[6] 50 U.S.C. § 4557 (formerly 50 U.S.C. App. § 2157); see also regulations regarding protection against claims at 15 CFR § 700.90 (DPAS); 45 CFR § 101.90 (HRPAS).

[7] Health resources are "drugs, biological products, medical devices, materials, facilities, health supplies, services and equipment required to diagnose, mitigate or prevent the

impairment of, improve, treat, cure, or restore the physical or mental health conditions of the population.” 45 C.F.R. § 101.20.

[8] Prior to the specific delegation of health resources to HHS, health resources fell under the general delegation to the Department of Commerce (“Commerce”) for “all other materials, services, and facilities.” Commerce then further delegated authority to place general orders to the Department of Defense and other agencies. It appears that a new delegation by HHS would be necessary to resurrect those agencies’ ability to place rated orders for health resources.

[9] Health Resources Priority and Allocations System (HRPAS), 80 FR 42408, <https://www.federalregister.gov/documents/2015/07/17/2015-17047/health-resources-priority-and-allocations-system-hrpas>, in Final Rule Stage per the Office of Information and Regulatory Affairs, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=0991-AB95>.

[10] 45 CFR § 101.30.

[11] 15 CFR § 700.13 (DPAS); 45 CFR § 101.33 (HRPAS).

[12] Id.

[13] 15 CFR § 700.14 (DPAS); 45 CFR § 101.34 (HRPAS).

[14] 15 CFR § 700.80, 700.81, 700.93 (DPAS); 45 CFR § 101.80, 101.81, 101.93 (HRPAS).

[15] 15 CFR § 700.12 (DPAS); 45 CFR § 101.32 (HRPAS).

[16] 15 CFR § 700.16(DPAS); 45 CFR § 101.36 (HRPAS).

[17] 15 CFR § 700.15 (DPAS); 45 CFR § 101.35 (HRPAS).

[18] Id.

[19] Id.

[20] Executive Order 13603, Section 201(b).

[21] “HHS to Procure N95 Respirators to Support Healthcare Workers in COVID-19 Outbreaks,” HHS News Release, <https://www.hhs.gov/about/news/2020/03/04/hhs-to-procure-n95-respirators-to-support-healthcare-workers-in-covid-19-outbreaks.html>; see also, “NIOSH approved (and/or FDA cleared) N95 respirators or other surgical masks/facemasks,” Presolicitation Notice, <https://beta.sam.gov/opp/406d8af718e143798530f905e8bebd15/view>.

[22] Id.

[23] Id.

[24] Id.

[25] Id.