

Implications of President Trump's COVID-19 Invocation of the Defense Production Act of 1950 for Manufacturers and Suppliers

In connection with the COVID-19 outbreak, there has been much discussion regarding President Trump's invocation (or refusal to invoke) the provisions of the Defense Production Act of 1950 ("DPA") to procure critical supplies such as ventilators and personal protective equipment. The DPA provides the President with several powers, including:

- to require acceptance of and prioritize the performance of contracts deemed necessary or appropriate to promote the national defense over the performance of any other contract;
- to prevent hoarding or price gouging for certain materials designated by the president as scarce or threatened;
- to allocate materials, services and facilities in such manner as the president deems necessary or appropriate to promote the national defense; and
- to provide incentives (such as loans and guarantees) for the development, maintenance, modernization, restoration and expansion of domestic sources for critical components, critical technology, materials and industrial resources essential for the execution of national strategy.

Contrary to some popular characterizations of the DPA, it does not enable the President to "nationalize" or seize any industry or company. Indeed, such broad powers were explicitly rejected by the U.S. Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

The DPA does, however, provide penalties of up to \$10,000 or a year imprisonment for willful violations of its mandates. It is therefore important for manufacturers, suppliers and other potential government contractors to have an understanding of their obligations should they be presented with an order for goods and services related to the invocation of the DPA.

Presidential Actions Under the DPA

To date, President Trump has taken three specific actions with respect to the DPA:

- Delegated authorities granted under the DPA to the Secretary for Health and Human Services ("HHS"), to include requiring prioritization of contracts, preventing hoarding of scarce resources, and developing incentives to expand domestic sources of critical resources. (3/18/2020, 3/23/2020, and 3/27/2020)
- Directed HHS to require General Motors to accept, perform and prioritize orders for ventilators. (3/27/2020)

- Directed HHS to use any and all authority to facility supply of ventilators from General Electric Company; Hill-Rom Holdings, Inc.; Medtronic Public Limited Company; ResMed Inc.; Royal Philips N.V.; and Vyair Medical, Inc. (4/02/2020).

Priority Rated Orders and Supplier Obligations

In the exercise of the delegated authority granted to by the foregoing executive actions, HHS has invoked to Health Resources Priority and Allocations System (“HRPAS”). On April 5, 2020, Secretary Azar approved the use of priority rating “DO” for contracts issued to the six suppliers identified in the April 2 Presidential action, i.e., General Electric Company; Hill-Rom Holdings, Inc.; Medtronic Public Limited Company; ResMed Inc.; Royal Philips N.V.; and Vyair Medical, Inc.

HRPAS sets forth two priority ratings as follows:

- “DO” rated orders have equal priority with each other and take precedence over unrated orders.
- “DX” rated orders have equal priority with each other and take precedence over “DO” rated orders and unrated orders.

45 CFR §101.31. Priority-rated orders must satisfy specific requirements as set forth under the HRPAS regulation.

The HRPAS regulation applies to suppliers receiving priority-rated orders from the U.S. Government. Those suppliers, in turn, are authorized to issue similarly priority-rated orders to subcontractors (such as UCC) to obtain items or services needed to fill a rated order. 45 CFR §101.35(a). The priority-rating thus continues down through the entire procurement chain from contractor to subcontractor to supplier, and the obligations to accept and prioritize such orders are placed on each person receiving a priority-rated order.

Upon receipt of a “DO” priority-rated order, a supplier must accept and prioritize that order over all unrated orders. The supplier also may not discriminate against rated orders in any manner, such as by charging higher prices or imposing different terms and conditions.

The HRPAS regulations provides for certain circumstances under which a supplier either must or may reject a priority-rated order, such as if the supplier cannot meet the specified delivery date, the customer will not agree to regularly established terms of payment, or the supplier is not capable of supplying the ordered items or services.

Acceptance or rejection of a priority-rated order must be done timely – within 15 working days for a “DO” rated order and 10 working days for a “DX” rated order.



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