

ALERT

# Act Now! Newly Proposed DPAS Rule Penalizes Inattention, Rewards Fast Action

February 4, 2014

On January 31, 2014, the Bureau of Industry and Security (BIS) issued a proposed rule revising the Defense Priorities and Allocations System (DPAS) regulations to clarify existing standards and to establish new procedures for the prioritization and allocation of materials, services, and facilities to promote national defense. This proposed rule follows a June 2010 proposal rule that would have substantially reorganized and expanded DPAS. See 75 Fed. Reg. 32,122. However, after receiving only one comment in response to its 2010 proposed rule, BIS reconsidered and revised some aspects of the proposed rule.

Although the new proposed rule is not as sweeping as the initial version, it incorporates several changes about which contractors should be aware. Of particular note, the proposed revision would shorten contractor timelines for action in two situations. Several of the principal proposed revisions are summarized below:

- **Timing of Confirmation of Verbal Notice of Delay.** The new proposed rule would reduce the amount of time within which a contractor must provide written confirmation of verbal notice of a delay in performance. Currently, a party must provide written confirmation of a performance delay within five days of verbally notifying the Government. The proposed rule would require written confirmation within **one day** of such notification. In the event a contractor fails to provide timely confirmation, the Government could seek an injunction to enforce compliance or to pursue contractual remedies such as default termination or liquidated damages. Willful violation of this requirement could also result in civil fines and/or criminal penalties.

## Practice Areas

Government Contracts

- **Emergency Preparedness Timelines.** The new proposed rule would authorize the use of rated orders for emergency preparedness activities and would allow such orders to require acceptance or rejection within a shorter amount of time than currently required. Under the existing regulation, a contractor must accept or reject a rated order within 10 or 15 working days of receiving a DX or DO order, respectively. The proposed rule recognizes that emergency preparedness rated orders may require acceptance or rejection within just **six hours** of receipt of an order issued in response to an event, or **12 hours** after receipt of an order issued in preparation for an imminent hazard. Here too, the Government would be able to enforce these provisions using an injunction, contractual remedies, and, when a contractor's inaction is willful, civil fines and criminal penalties.
- **No Special Treatment for Metal Working Machine Industry.** The new proposed rule removes the special treatment for the metal working machine industry. The existing regulation limits the number of DO rated orders that metal working machine producers must accept. However, BIS determined that the limitation is not necessary because the maximum set by regulation has never been met.
- **New Assistance Procedures.** The new proposed rule provides a procedure for requesting assistance in obtaining rated items for homeland security, emergency preparedness, and critical infrastructure protection programs. Currently, there is no mechanism for requesting assistance obtaining rated items for these initiatives. The proposed rule directs persons to send requests for assistance to the Office of Policy and Program Analysis, Federal Emergency Management Agency (FEMA).
- **Constructive Notice of Allocation Orders.** Whereas the June 2010 proposed rule would have required agencies to issue allocation orders directly to affected persons, the new proposed rule would permit issuance by constructive notice through publication in the Federal Register. To constitute constructive notice, an allocation order published in the Federal Register would be required to identify the person(s) to whom the order applies by name, or to describe the **general class of persons** to whom the order applies.

Comments on the proposed rule are due on or before April 1, 2014. Because these changes could dramatically affect contractors' rights and obligations under DPAS, interested parties who find them unduly burdensome should ensure they are heard.