



# DEFENSE PRIORITY RATINGS: KNOW THE RULES

From the time a Department of Defense (DoD) program lands on the classified “secret” document known as the Master Urgency List (MUL), most orders placed to complete that program will have a priority rating. Most contractors and subcontractors who deal with these orders must therefore have a working understanding of the rules that govern them. Rated orders were born out of the War Powers Act and Defense Production Act (DPA), but whether the United States is at peacetime or engaged in military action, rated orders deserve the utmost attention of the companies who handle them.

Federal regulations govern the whole business of defense priority ratings, and they can be difficult to interpret. Misinterpretations by contractors and subcontractors alike can have unfortunate consequences for both parties. This article provides a synopsis of the priority ratings rules so that contractors and subcontractors may better understand how to process rated orders.

## THE PROMULGATING LAW

The defense priority ratings began in 1950 when the DPA was passed, and then amended on occasion since then. Under the DPA, found at 50 USC App. 2061, the President, as Commander in Chief, may require contracts to be issued on a priority basis to promote the na-

tional defense over other contracts or orders.<sup>1</sup> Other rules, such as the seizing of a plant, may come into affect for DoD procurement in time of war or when war is imminent.<sup>2</sup> Implementing the DPA is the Defense Priorities and Allocation System (DPAS), hereafter referenced as Title 15, Part 700 of the Code of Federal Regulations.

The President’s authority under these code sections is delegated to the Secretary of Commerce.<sup>3</sup> Disputes governed by Title 15, Part 700 must be exhausted before the Department of Commerce, specifically through the Office of Strategic Industries and Economic Security.

## THE PRIORITY RATINGS

The regulations establish two levels of priority ratings, DO and DX. The regulations state: “All DO rated orders have equal priority with each other and take preference over unrated orders. All DX rated orders have equal priority with each other and take preference over all DO rated orders and unrated orders.”<sup>4</sup> One higher level exists, however, and that is if Commerce issues a Directive, which takes precedence over DX rated orders as well as all others.<sup>5</sup>

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Program identification symbols are added as a suffix to the priority rating prefix (DO-A1, for example, where A1 is the program identification). These symbols range from A1 through N1, but not all numbers or letters are inclusive.<sup>6</sup> Each program symbol signifies the type of application. For instance, A1 means aircraft, A2 means missiles, A7 means electronics and communications equipment, H1 means certain combined orders, and N1 stands for emergency preparedness activities.<sup>7</sup>

## HOW RATINGS ARE ASSIGNED

The DoD's Master Urgency List (MUL) identifies critical defense production programs and research and development projects ranked as the nation's highest priorities. A classified "secret" document, the MUL contains two lists of programs, Brick Bat and Cue Cap, each establishing the order of priority preference. The President designates the Brick Bat program priority list and assigns the DX rating to those programs. The Secretary of Defense specifies which remaining programs will go on the Cue Cap list, and the Secretary assigns those programs DO ratings. DX rated programs are considered of the highest national priority, while the DO rated programs are considered of the highest DoD urgency.

## ELEMENTS OF A RATED ORDER

Each rated order must include the rating symbols (for example, DO-A7, DX-H1).<sup>8</sup> The rated order must also contain a required delivery date or dates.<sup>9</sup> The words 'immediately' or 'as soon as possible' do not constitute a delivery date.<sup>10</sup> Some procurement documents, such as requirements contracts, basic ordering agreements, or prime vendor contracts may not contain specific delivery dates. However, the specific purchase orders issued against those procurement documents must specify a required delivery date or dates, and thus will be considered rated orders.<sup>11</sup> That rating date begins to run upon receipt by the supplier, not when the original procurement document is dated.<sup>12</sup>

The third element, requiring a written or digital signature of the person placing the order, must also be present on rated orders.<sup>13</sup> The final element, as stated in subsec-

tion 700.12(d), requires the following language be on every rated order: "This is a rated order certified for national defense use, and you are required to follow all the provisions of the Defense Priorities and Allocations System regulation (15 CFR part 700)."<sup>14</sup>

## ACCEPTING AND REJECTING RATED ORDERS

Section 700.13 of the regulations mandate that rated orders be accepted cannot be discriminated against with such actions as higher pricing or separate terms and conditions, and must be rejected if the delivery dates cannot be met because of other rated orders of equal or higher priority. However, where new rated orders conflict with rated orders already accepted, the newer orders must be accepted based on the earliest delivery date otherwise possible.<sup>15</sup> There are some exceptions to mandatory acceptance other than delivery conflicts known as "Optional Rejection" clauses in the regulations, but these are fairly arcane circumstances.<sup>16</sup> Circumstances requiring rejection of rated orders trigger timely customer notice requirements, such as 15 days for DO rated orders and 10 days for DX rated orders.<sup>17</sup>

## PREFERENTIAL SCHEDULING

Companies receiving rated orders must schedule operations, including the procurement of all required materials, on a timeline sufficient to meet the delivery dates of rated orders.<sup>18</sup> Modifying production or delivery schedules is necessary only when required delivery dates for rated orders cannot otherwise be met.<sup>19</sup> That stated, rated orders still must be given production preference over unrated orders, if necessary to meet required delivery dates.<sup>20</sup>

Here's an important example given by the regulations: "If a DX rated order is received calling for delivery on July 15 and a person has a DO rated order requiring delivery on June 2 and operations can be scheduled to meet both deliveries, there is no need to alter production schedules to give any additional preference to the DX rated order."<sup>21</sup> The same is true for DO rated orders versus unrated orders; there is no need to adjust opera-

tions so long as the DO rated order delivery dates are on schedule.

Where rated orders are of equal priority and conflict with one another on delivery or production performance, then the delivery dates on the respective rated orders take precedence without regard to the dates each order was received.<sup>22</sup> However, should these conflicting orders of equal priority have the same delivery dates, the receipt dates would take precedent.<sup>23</sup>

Customers may seek special priorities assistance through the Delegate Agency and up through the Department of Commerce, if necessary.<sup>24</sup> However, while the regulations provide for various reasons in which special priorities assistance will be provided (to meet required delivery dates, for example), they also state specific reasons in which assistance will not be provided. The most notable reason the Delegate Agency will not provide assistance is where the customer desires to "obtain delivery prior to the time required to fill a rated order."<sup>25</sup>

Furthermore, rated orders may not be used to obtain delivery on a date earlier than needed.<sup>26</sup> Generally, rated orders may not be used to obtain items in advance of the receipt of a rated order.<sup>27</sup>

There are some provisions in the regulations providing for amendments to rated orders. Recall the general rule: Where a contractor desires a subcontractor to move the contractor's order ahead of others currently in production, it may generally do so only if the subcontractor's schedule is slipping beyond the order's delivery dates. Where the subcontractor is on schedule, however, the rating on the order only takes precedence over other lesser rated orders or non-rated orders, or equal rated orders having the same delivery dates but later receipt dates. To circumvent these circumstances, one option the contractor might invoke would be to increase the rating on the order through an amendment as provided by 15 CFR §700.16. If the amendment significantly alters the original production or delivery schedule, the amended order then becomes a new rated order as of the date of its receipt.<sup>28</sup> Under Section 700.13, the subcontractor must accept or reject such an

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amended order depending on the affects the amended order will have on other rated orders of equal or higher priority.

Practically speaking, to amend a rated order the contractor would have to petition the Delegate Agency for a higher rating offering evidence for the amendment other than simply showing a need for earlier delivery dates. Also, the customer would risk the "receipt date" rules if the amended order becomes a new order and it conflicts with other equally rated orders (previously higher rated orders prior to the amendment).

## EXTENSION OF PRIORITY RATINGS

Priority ratings must be passed on to subcontractors' suppliers where necessary to meet delivery requirements.<sup>29</sup> That is, should a subcontractor receive a DO-A3 rated order, it generally must procure materials under the same rating and notice requirements required by the regulations, if necessary, to meet required delivery dates. Section 700.17(d) could be of value to subcontractors that might typically order piece parts in 1000-piece lots, but really only need 300 each to fill a particular rated order. Subcontractors are allowed and sometimes required to specify that 300 each of the 1000-piece order is a rated quantity equal to the contractor's rated purchase order, but that 700 each are unrated.<sup>30</sup> The four elements of a rated order must appear on the subcontractor's procurement documentation as well.<sup>31</sup> The bottom line, however, is that a subcontractor is only required to extend priority ratings to its suppliers if it cannot meet the required delivery dates of the rated order under its normal procurement and produc-

tion operations, or if the total value of the materials ordered is greater than \$50,000.<sup>32</sup>

## CONCLUSION

Companies working with rated orders can better manage rated order schedules when management understands these rules. Contractors and subcontractors can avoid conflicts with respect to these orders by understanding the expediting process provided in the rules.

Amendments to rated orders and exceptions to the rules, especially during wartime, are rare events. Therefore, the smaller subcontractor needs to primarily understand the impact the priority ratings really have on its orders and when it is supposed to pass the ratings on to its vendors. To remain in compliance with Title 15, Part 700, subcontractors should maintain a clear and current matrix of all rated orders currently in house showing each order's rating and critical delivery dates.

However, should a rated order schedule begin to slip beyond the original order date, subcontractors must also understand that other lower or non-rated orders may be adversely impacted. Contractors can enforce the performance of rated orders by requiring subcontractors to place on hold lower or non-rated orders, or by requiring the subcontractor to pull piece parts from other order kits to meet the rated order delivery dates.

All of the DPAS regulations notwithstanding, agreement to earlier deliveries because a subcontractor reasonably believes it can meet them remains a business decision unrelated to the authority of priority rated orders. The rated order delivery requirement will remain the delivery dates the rated purchase order reflects. ■

## References

1. 15 CFR §700.1(a).
2. Id. at §700.1(b), citing 10 USC 2538 and 50 USC 82.
3. Id. at §700.10(a) citing Executive Order 12919 of June 3, 1994 (59 FR 29525).
4. Id. at §700.11(a)(2).
5. Id. at §700.11(a)(3).
6. 15 CFR §700, Schedule I.
7. Id.
8. 15 CFR §700.12(a).
9. Id. at §700.12(b).
10. Id.
11. Id.
12. Id.
13. Id. at §700.12(c).
14. Id. at §700.12(d).
15. Id. at §700.13(a)-(b).
16. Id. at §700.13(c).
17. Id. at §700.13(d).
18. Id. at §700.14(a).
19. Id. (emphasis added).
20. Id. at §700.14(b).
21. Id.
22. Id. at §700.14(c)(1).
23. Id.
24. Id. at §700.50.
25. Id. at §700.54(b) (emphasis added).
26. Id. at §700.18(a)(2)(i).
27. Id. at §700.18(a)(2)(iii).
28. Id. at §700.16(c).
29. Id. at §700.15(a), see also §700.17(a)-(b).
30. Id. at §700.17(d).
31. Id.
32. Id. at §700.17(f).



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