

FEMA Walks Back Use Of Wartime Law To Get Virus Test Kits

By Alyssa Aquino

Law360 (March 25, 2020, 8:25 PM EDT) -- The Federal Emergency Management Agency said it obtained coronavirus test kits without relying on the Defense Production Act, a sharp about-face from an announcement about 12 hours earlier that the agency would invoke the wartime law.

FEMA Administrator Peter Gaynor said Tuesday morning that the government would use the DPA to obtain 60,000 coronavirus test kits, but reversed the decision after President Donald Trump clarified later in the day that his administration had not ordered the full use of the statute.

“At the last minute, we were able to procure the test kits from the private market without evoking the DPA,” FEMA press secretary Lizzie Litzow told Law360 in an email late Tuesday.

The flip-flop highlights government contractors’ ongoing uncertainty as to whether the Trump administration will be fully enforcing the Defense Production Act of 1950, which grants the president broad economic authority to address shortages in items and services necessary for national defense.

Samantha Clark, a special counsel at Covington & Burling LLP, told Law360 she was surprised by the quick turnaround.

“Everyone is on high alert that [the DPA] could be used and could be used on short notice,” she said.

Some companies are beginning to prepare for such an order, but Clark stressed that companies who don’t traditionally contract with the government are watching statements from government officials.

Trump invoked the act on March 18 in an executive order addressing medical supply shortages amid the coronavirus pandemic. The order gives the U.S. Department of Health and Human Services the ability to prioritize federal contracts of “personal protective equipment,” ventilators and other medical products.

Giovanna Cinelli, head of the international trade and national security practice at Morgan Lewis & Bockius LLP, told Law360 that issuing orders under the DPA “is a very fluid process,” rife with constant overlapping developments.

Government officials may give orders — such as Gaynor’s call for 60,000 coronavirus test kits — as they’re holding discussions with private company heads. Should the private sector immediately fill that order, the previous order is mooted, Cinelli said.

“For companies that work with the government all the time, I think there will be an appreciation for the fluid nature of the process and there will be less of a surprise regarding the order and the step-back that was expressed,” Cinelli said.

But she acknowledged the process may be confusing for industry executives who haven’t regularly contracted with the government and are now answering the administration’s call for medical supplies.

Fred Levy, co-chair of Covington’s government contracts practice group, said that if anything, Tuesday showed that people will have to turn to the president to be certain of official administration policy.

But even before Tuesday, Levy said his federal contractor clients have been reaching out to him for advice.

“Regardless of whether a company is a government contractor or not, most companies aren’t familiar with all the authorities that are being called into play,” Levy said.

Levy said his clients’ concerns included: What does the DPA allow? How does Trump’s executive order invoking the DPA work? How will this affect current contracts?

Like Cinelli, Clark also pointed out that there is a process to fully enforcing the DPA. The act gives the president the authority to open up a private company’s production line, but that hasn’t been done for 50 years and companies may misunderstand how the process would be rolled out, the Covington attorney said.

“We need some clear guidance,” Clark said.

The White House and FEMA didn't respond to requests for comment on Wednesday.

---Additional reporting from Dorothy Atkins. Editing by Jill Coffey.

Correction: A previous version of this story misspelled Giovanna Cinelli's last name. The error has been corrected.