

PUBLIC-PRIVATE PARTNERSHIP IN DECLARED STATE OF EMERGENCY – A COMPARATIVE STUDY OF THE USA FEDERAL DEFENSE PRIORITIES AND ALLOCATIONS SYSTEM

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ABSTRACT. The aim of the report is by means of comparative study of the US federal priorities and allocation system to introduce the possibility for constructing a public-private partnership mechanism, based on a system of priority contracts which is meant to guarantee security of supply in emergency.

Keywords: public-private partnership, scarce resources, security of supply

ПУБЛИЧНО-ЧАСТНО ПАРТНЬОРСТВО ПРИ ИЗВЪНРЕДНИ РЕЖИМИ НА ДЪРЖАВНО УПРАВЛЕНИЕ – СРАВНИТЕЛНО ИЗСЛЕДВАНЕ НА ФЕДЕРАЛНАТА СИСТЕМА НА САЩ ЗА ПРИОРИТЕТНОСТ И РАЗПРЕДЕЛЕНИЕ

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РЕЗЮМЕ. Основната цел на доклада е посредством сравнително изследване на федералната система за приоритетност и разпределение на ресурсите в САЩ, да представи възможностите за създаване на механизъм, основан на публично-частно партньорство, за гарантиране сигурността на доставките в условията на извънредни режими на държавно управление, чрез система от приоритизирани договори.

Ключови думи: публично-частно партньорство, оскъдни ресурси, сигурност на доставките

Introduction

The global pandemic caused by COVID-19 has become a global test for the adequacy of the emergency management legislation and system – both national and at regional level of cooperation. The current situation is unique for some reasons: the unprecedented scale of people affected all over the world and global scarcity of certain critical products like face masks, ethyl alcohol and breathing and respiratory equipment.

Bulgarian emergency management legislation provides the following decisions for security of supply in emergencies: the use of state reserves under the State Reserves and Wartime Stockpiles Act (SG 9/ 2003, last amend SG 65/ 2020) and the use of private resources and products under a signed agreement for assistance in emergency with private entities under the Disaster Protection Act (SG102/ 2006, last amend SG 60/ 2020). State reserves are intended to be used in state of war or emergency and crisis situations and they have to supply the population and national market. The main problem – they are calculated for a certain period of time and have a limited amount and there is always the risk it is unavailable, inadequate, of poor quality or just missing. The legal regulation for agreements of assistance is scarce at legislative level and it only gives the plea for signing such kind of agreements. There is no legal regulation for the content of the agreements and types of assistance – all these questions are decided at the level of emergency planning – which means no imperative provision for the content and no guarantee about the quality and availability of the assistance, also no transparency, no

strict and stable rules for the public-private partnership. The lack of legal regulation harms the principle of public-private partnership and shared responsibility for emergency preparedness. Security of supply is managed only by a standardization document¹ but it does not have a legal binding force.

That is why a comparative study of other national models is a good starting point for discussion.

Comparative study includes the concept for priorities and allocation system and the legal reglamentation of the thematic in order to point out the main idea that a special legislation development is needed to improve our national model.

A special form of public-private partnership

A special form of public-private partnership that helps the government and the state to share the responsibility of emergency supply with scarce items, materials and resources is the Defense Priorities and Allocation System (DPAS). It is based on the Title I of the Defense Production Act 1950 which is used also for emergency preparedness activities pursuant to Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act and the priorities authority of the selective service act. The system is administered by the Bureau of Industry and Security², Department of Commerce.

¹ BDS ISO 28 000:2012 Specification for Security Management Systems for the Supply Chain, Bulgarian Institute for Standardization.

² The Bureau of Industry and Security administers this authority through the Code of Federal Regulation, §700.

There is a clear legislative regulation for the functioning and administering the system which includes Defense Production Act, The National Defense Resources Preparedness Executive Order 13603 (which delegates the authority to various agencies and addresses national defense resources programs and policies) and Defense Priorities and Allocation System (DPAS) Regulation 15 Code of Federal Regulation, §700 with respect to industrial priorities.

Key features

The main aim of the USA federal defense priorities and allocation system is to ensure **expeditious** availability of products, materials and services by means of prioritized national contracts throughout the USA supply chain in order to support **certain approved programs of a broad scope**. These programs relate to defense, energy, homeland security, emergency preparedness and critical infrastructure, and also to provision of military or critical infrastructure assistance to foreign nations³.

The Defense priorities and allocation system gives an alternative approach to overcome lack of or scarce resources and items needed in emergency and to supplement the available stockpile resources – by means of rated orders certain scarce resources and items can be produced with priority. It is very important that the system of priority and rated orders includes not only the main contractor but also all the sub-contractors or participants at the supply chain. In terms of rated orders they are complied with priority to all other orders and this priority follows the sub-producers. The activation of the priority is also a plea for other not rated orders to wait without penalties to be due.

This system has special purpose in national security public - private partnership relations – from one hand it is aimed to minimize disruption in normal commercial activities, but on the other – it meets national security requirements. It is aimed to provide authority to USA government agencies to order priority performance of contracts and allocate materials and also to support rapid industrial response in a national emergency.

The authority to place priority ratings to government contracts is delegated by the Department of Commerce to the following competent federal departments: Department of Defense, Department of Energy, Department of Homeland Security and General Services Administration. Department of Defense applies its own manual. Also on a case by case base this authority might be delegated to other national agencies or foreign governments and also to national or foreign contractors, subcontractors, suppliers or owners or operators of critical infrastructure. But this second option is under condition – it is possible to delegate authority to other persons if the request is considered to be necessary or appropriate to promote the national defense.

Who is obliged under DPAS

The spectrum of the obliged persons is very broad – DPAS concerns all person and legal entities in the USA, there is an imperative obligation for all of them to comply with the provisions of the regulation and to accept rated orders and to wait performance of unrated orders in case of a rated order.

Special priorities assistance

The regulations provide the option of special priorities assistance for persons and companies. Department of Commerce and other delegated authority agencies are competent to assist. Special priorities assistance is given if the request is timely and the applicant has made a reasonable effort to resolve the problem by oneself. Although the regulations provide that assistance is given for “any reason” it should be clear that assistance is refused in situations that are unconscientiously or unfair (like attempting to secure a price advantage, gain competitive advantage, disrupt an industry apportionment program in a manner designed to provide a person with a unwarranted share of scarce items, overcome a supplier’s regularly established terms of sale or conditions of doing business). There are certain types of situations concerned as usual for provision of assistance – in case of difficulties in obtaining delivery for items for rated orders, if a person cannot locate a supplier for an item for a rated order, if it is necessary to ensure that the rated orders will be treated preferentially, if there is a need to resolve a conflict of production or delivery of various rated orders, verification of urgency of rated orders and determination of the validity of the rated orders.

Application of DPAS in COVID-19 pandemic

DPAS has proved its effectiveness in COVID-19 pandemic and gave the possibility for reasonable public-private partnership in order to preserve public interest.

After the declaration of state of national emergency on 13 March 2020 and invocation of the Defense Production Act by the US president Donald Trump, DPAS regulations has been activated several times in order to supplement the need for scarce products and items. On 27 March 2020 the Secretary of Health and Human Services has required from General Motors Company to accept, perform and prioritize federal contracts for medical ventilators. On 2 April 2020 there was a second invocation of Defense Production Act by the president of the country in order to clear supply chain issues in production of ventilators and N95 face masks. On 3 April 2020 there was a third invocation in order to compel a US manufacturer of N95 face masks to send them in factories overseas and to stop exportation of currently produced ones. The application of DPAS has encountered a problem with the Buy American Act (BAA) 41 U.S.C. chapter 83, the Trade Agreement Act (TAA) 19 U.S.C. 2501. That is why many government contractors have become subject of lawsuit under the False Claims Act.

The BAA requires that federal government purchases only products manufactured in the USA and that these products will be used in the USA. The act applies to orders that amount to \$20 000 or more. The federal government may use foreign products only under certain conditions – if the domestic price is unreasonable. That is why rated orders should be accomplished with product manufactured in the USA. There is a possibility under the Trade Agreement Act that the president can waive the BAA and allow foreign products to be used but this is possible to happen only for products originating in countries which have signed an international trade agreement with the USA or meets other criteria like least developed country. And again the value of the rated order is the most important one. If the value of the rated order is \$182 000 or more than the Federal Acquisition Regulation apply and the recipient provides only products manufactured in Trade

³ The full list of approved programs is published at Schedule I, §700 Code of Federal Regulation-2016-title 15

agreement countries. The problem is that many products are manufactured in China, Malaysia, India and other countries that have not signed a trade agreement with USA and there is an urgent need for verification of the supply chain in order to avoid liability⁴.

In conclusion DPAS is an example of supplementary support in situations of severe need to keep the balance between preserving public interest and not to disrupt normal trade relations. That is why it is reasonable to improve Bulgarian approach for public-private partnership in emergency situations with supplementary models that are clearly and fully regulated, the rules for partnership and the obligations of the private contractors are explicit and legally introduced and the most important – these rules encourage conscientious partnership.

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