Overview

For additional guidance, please refer to Steptoe’s COVID-19 Resource Center.

The Defense Production Act of 1950, 50 U.S.C. §§ 4501 et seq. (DPA), had been – until March 27 – a mystery player in the federal government’s response to the COVID-19 pandemic. Often mentioned, seemingly all-powerful, but also largely held in abeyance, the DPA is now being used to harness the power of the private sector to produce medical equipment that is in short supply. President Trump, for example, announced that he has directed the Department of Health and Human Services (HHS) to use “any and all authority” under the DPA to require General Motors to accept, perform, and prioritize federal contracts for ventilators. The following sets forth some essential background on the DPA, its authorities, and why it matters to American industry.

Background on the DPA

The DPA is the successor to the war powers legislation used during World War II to direct US industrial capacity to produce war materiel. While those wartime powers were allowed to lapse, the DPA was passed in 1950 after the outbreak of the Korean War to give the president emergency powers in order to obtain needed war materiel and supplies. The DPA was revised in 1994 to allow its use during major disasters and emergencies declared under the Stafford Act.

The DPA affords the president sweeping authority to influence and shape domestic industry in the interest of the “national defense,” which is broadly defined to include emergency preparedness and response activities under title VI of the Stafford Act. Among other purposes, the DPA is intended to ensure that the nation has an adequate supply of essential goods necessary to respond to a national emergency. To achieve this purpose, the president is granted the authority to require businesses to prioritize performance of certain contracts or purchase orders over other work and to require the allocation of materials, services, and facilities deemed “necessary or appropriate to promote the national defense.”

Under the authority afforded him under title III of the DPA, the president may provide economic incentives, such as loans, direct purchases, and purchase commitments to secure this domestic production.

On March 18, President Trump issued an Executive Order invoking the DPA to prioritize and allocate health and medical resources to respond to the spread of COVID-19. Nine days later, on March 27, the president: (1) signed the Coronavirus Aid, Relief, and Economic Security Act of 2020, which includes $1 billion to increase manufacturing capabilities that are key to increasing the production rate of personal protective equipment and medical equipment to meet the demand of healthcare workers all across the nation; (2) directed the use of the DPA to order General Motors to manufacture ventilators for medical use; and (3) named US Trade Representative Peter Navarro as the national DPA policy coordinator.

Relevant DPA Authorities

The DPA includes four primary authorities relevant to the COVID-19 pandemic: (1) priorities authority; (2) allocations authority; (3) financial incentives authorities; and, (4) voluntary agreements.
Under Title I of the DPA, the federal government has the authority to require that contracts be accepted and that they receive priority, even where those contracts would displace existing government or commercial contracts—in essence, permitting federal government contracts rated under the DPA to “jump the line.” The DPA provides an affirmative defense for the contractor against breach of contract claims by other customers with existing orders that are delayed by the contractor to meet the national defense needs articulated in the DPA. While the DPA assigns this authority to the president, the president has delegated this authority by Executive Order to six cabinet departments:

- The US Department of Agriculture
- The US Department of Defense
- The US Department of Energy
- The US Department of Health and Human Services
- The US Department of Transportation
- The US Department of Commerce

Any of these six cabinet departments can issue priority ratings under the DPA for contracts within their subject area jurisdiction. FEMA chairs the DPA Committee, established under the DPA to ensure the effective use of the DPA across federal agencies.

Title I also provides authority to allocate limited supplies of raw materials as well as services and facilities, in order to deconflict competing demands and ensure that the use of materials, services, and facilities meets national priorities. Each of the six cabinet departments listed above hold allocations authority for their subject areas. These allocations can take the form of a set-aside, a directive, or an allotment.

Title III of the DPA provides the authority to use financial incentives to encourage private industry to focus production and services on specific national defense priorities. These incentives can include government purchases, purchase commitments, permission for private industry to use government-owned equipment, and guaranteed loans.

Finally, Title VII of the DPA allows voluntary agreements between the federal government and two or more entities within an industry sector without regard for federal antitrust laws. This authority would allow the federal government to coordinate production among manufacturers who otherwise would not be allowed to coordinate with each other due to antitrust concerns.

The Defense Priorities and Allocations System

The Defense Priorities and Allocations System (DPAS) is the mechanism used to prioritize certain contracts and orders. There are two levels of priority ratings, identified by the rating symbols “DX” and “DO.” A DX rating is of the highest national defense urgency and takes preference over DO and unrated orders. DO rated orders are critical to national defense and take preference over unrated orders. A DPAS rated order will include a priority rating, the required delivery date, and should reference a specific Federal Acquisition Regulation (FAR) clause (FAR 52.211-15) and/or include language along the following lines: “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 regulations (15 CFR part 700).”

A company in receipt of a DPAS rated order must timely accept the order and must “schedule operations, including the acquisition of all needed production items, in a timely manner to satisfy the delivery requirements for each rated order,” to include “flowing down” the rating to suppliers. However, a company may not accept a rated delivery order, informing the government at the earliest possible date, if it cannot meet the specified delivery date. Importantly, scheduling conflicts with previously accepted lower rated or unrated orders (including commercial orders) are not sufficient reason for rejecting a DPAS-rated order. There are limited circumstances in which a company has the option to reject a DPAS-rated order as long as the company does not “discriminate among customers.” For example, a company may reject a DPAS-rated order if it “is for an item not supplied or a service not performed,” or for an item “produced, acquired, or provided only for the supplier’s own use for which no orders have been filled” in the two years prior.

"Excusable Delay" on DPAS-Rated Orders

As for contractors currently performing under DPAS rated contracts and orders supporting other national defense priorities unrelated to the response to COVID-19, it is important to be in close communication with customers (federal agencies and prime contractors) in the event that business operations are disrupted. As more and more states issue “Shelter-in-Place” or “Stay-at-Home” orders to stop the spread of COVID-19, contractors will have to adjust their current business operations to comply with these orders. Under most of these orders, critical manufacturing and other activities performed in support of the Defense Industrial Base, including individuals that support those activities, are excepted from shelter-in-place orders and these contractors should continue normal operations while following Centers for Disease Control (CDC) guidance on COVID-19 mitigation strategies. As a result, many contractors with DPAS-rated orders should be able to continue (somewhat) normal operations, and fulfill their DPAS-rated orders.
However, even if contractors with DPAS rated orders are able to continue operating, COVID-19 related disruptions remain likely and could result in performance delays. Rated orders, like any other orders, anticipate the possibility of delays. After accepting a rated order, the contractor must immediately provide written notice to "the customer" if "shipment or performance will be delayed," including reasons for the delay, and a new shipment or performance date.[13] Also like any other orders, rated orders also must include FAR Default clauses, which recognize that a contractor should not be in default due to a failure to perform or to make progress "if the failure arises from causes beyond the control and without the fault or negligence" of the contractor. The FAR lists examples of excusable causes including, as relevant here, "epidemics" and "quarantine restrictions."[14] As a result, contractors should notify their customers if DPA-rated orders will be delayed, or will not be able to be executed, due to COVID-19 related issues such as contaminated plants or a depleted workforce.

The President's March 18 Executive Order Invoking the DPA

On March 18, President Trump issued an executive order invoking DPA authorities for response to the COVID-19 pandemic. In that Executive Order, the president delegated the authority to exercise the DPA’s different tools to the Secretary of Health and Human Services, Alex Azar. Secretary Azar is empowered to determine "the proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials (including applicable services) in the civilian market, for responding to the spread of COVID-19 within the United States." The Executive Order noted that "personal protective equipment and ventilators" are among the resources necessary to respond to the spread of COVID-19.

The President's March 27 Statement Regarding the DPA

After the March 18 Executive Order, it appeared that the federal government would begin using the DPA to direct production of needed medical supplies. For example, FEMA initially announced that the administration would invoke the DPA to secure approximately 60,000 test kits.[15] However, subsequent statements by the president seemed to indicate that DPA authority would not be necessary in order for the federal government to obtain and distribute those supplies in the most need, including N95 masks and other types of personal protective equipment and ventilators. FEMA, in its role as DPA Committee chair, appeared to take on DPA coordinating authority, and the White House also established the "Supply Chain Stabilization Working Group" to ensure a stable supply chain of medical equipment and supplies.

However, on March 27, the White House announced that the president signed a Presidential Memorandum directing Secretary Azar to "use any and all authority available under the Defense Production Act to require General Motors to accept, perform, and prioritize Federal contracts for ventilators." President Trump also announced that Trade Representative Navarro would become the national DPA policy coordinator going forward.

American industry should keep a watchful eye on whether the federal government will begin making greater use of DPA authorities, especially given the Congress’s appropriation of $1 billion in funding for DPA procurements and financial incentives under DPA Title III. Steptoe’s COVID-19 and Government Contracts teams will update this alert as appropriate when the administration invokes the DPA as a tool in the nation’s arsenal against COVID-19.

[3] President Donald J. Trump’s Executive Order can be found (here).
[8] § 700.13(b).
[9] See id.
[10] § 700.13(c).
[12] Steptoe’s alert on the Essential Workforce can be found here.
[14] See FAR 52.249-14, 52.249-8, and 52.212-4.