

Defense Production Act: What does it do and how does it work?



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Defense Production Act (DPA)

- Defense Production Act (DPA) of 1950 (P.L. 81-774, 50 USC Sec 4501 et seq.)
- Broad set of authorities to influence domestic industry to provide essential materials and goods needed for national defense

DPA: History

- Originally passed in 1950 in response to the Korean War
 - Based on the War Powers Act of WWII
 - Originally included Titles I-VII, but Congress allowed Titles II, IV, V and VI to lapse in 1953
 - Its been reauthorized 53 times, most recently it was extended by Congress in the 2019 NDAA until 30 September 2025
- Congress has expanded the term “national defense”
 - Extends beyond military preparedness and capabilities
 - Now includes domestic preparedness and recovery from natural hazards, terrorist attacks and other national emergencies

DPA: Who Can Use It and for what?

- Authority to implement is afforded to the President
- **Title I: Priorities and Allocations:** Allows the President and those agencies with delegated authority, to require persons and businesses to prioritize and accept contracts for materials and services as necessary to promote the national defense
- President Obama, following his predecessors, delegated this authority in 2012 (under EO 13603) to the following:
 - Secretary of Agriculture: food sources, food resource facilities, livestock resources
 - Secretary of Energy: all forms of energy
 - Secretary of Health & Human Services: health resources
 - Secretary of Transportation: all forms of civil transportation
 - Secretary of Defense: military preparedness and water resources
 - Secretary of Commerce: all other material, services and facilities, including construction

DPA: Who Can Use It and for what?

- **Title III: Expansion of Productive Capacity and Supply:** Allows the President to incentivize the domestic industrial base to expand the production and supply of critical materials and goods
 - Authorized incentives include: loans, loan guarantees, direct purchases and purchase commitments, and the authority to procure and install equipment in private industrial facilities
 - Uses include: Advanced Drop-In Biofuel Production Project, projects to support radar and electronic warfare – i.e., used to establish a domestic capacity to produce advanced technologies deemed essential for national defense
 - Today: recently used to direct GM and others to pivot production to make ventilators and other items needed to fight the COVID-19 pandemic
 - President Trump has delegated authority under Title III to HHS and DHS in their efforts to respond to the spread of COVID-19

DPA: Who Can Use It and for what?

- **Title VII: General Provisions:** includes key definitions for the DPA and several distinct authorities, including the authority to:
 - establish voluntary agreements with private industry
 - block proposed or pending foreign corporate mergers, acquisitions, or takeovers that threaten national security
 - employ persons of outstanding experience and ability and to establish a volunteer pool of industry executives who could be called to government service in the interest of the national defense
 - President Trump delegated authority under Title VII to HHS and DHS in their efforts to respond to COVID-19
- **Uses:** special preference for small business, definitions of key terms, industrial base assessments, voluntary agreements and several others

DPA: How it Works

- The DPA and its implementing system e.g., Title I, Defense Priorities & Allocations System (DPAS), allow the Federal Government to “cut the line” when ordering from businesses through a process called a “Rated Order.”
 - Prime contracts, subcontracts or purchase orders in support of an authorized program are given a priority rating (DX, DO, unrated)
 - Rating should be clearly identified on the face of the contract/order
 - DX rating takes priority over a DO rating, which takes priority over an unrated order
 - Rated orders take priority over unrated orders and orders from a contractor’s commercial customers, even if those orders were placed before the rated order

DPA: How it Works

- When a contractor, subcontractor or supplier receives a rated order it must either accept or reject it, in writing, within a certain time period
 - 15 working days for DO rated orders
 - 10 days for DX rated orders
- Prime contractors are responsible for extending the received contract rating to their entire product supply chain, to the lowest level, so it can fill the rated orders or obtain replacements of inventoried items
 - To properly extend the rating, contractors must ensure the rating is clearly identified on its subcontracts/orders

DPA: How it Works

- Although the Government will not compensate contractors for costs associated with loss of work resulting from performing a rated order, DPAS does protect a contractor from breach of contract claims when it is unable to meet the obligations of its unrated orders
 - The General Services Administration (GSA) has issued additional guidance on DPAS orders
- The invocation of the DPA also allows the federal government to “allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as [the President] shall deem necessary or appropriate to promote the national defense.” 50 USC § 4511(a).

DPA: In Response to COVID-19

- 13 March 2020: The President declared a national emergency under the Stafford Act, 42 USC §§ 5121-5207
 - Declaration allows use of the “emergency preparedness” measures of the federal government
 - Includes “all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard.” 42 USC § 5195a(a)(3).

DPA: In Response to COVID-19

- 18 March 2020: the President issued EO 13909 to invoke the DPA and delegate authority to HHS
 - HHS has authority to determine proper nationwide priorities and allocation of all health and medical resources ,including controlling the distribution of such materials and applicable services in the civilian market, for responding to COVID-19 within the U.S.
 - EO specifically references personal protective equipment (PPE) and ventilators as medical resources needed to respond to the spread of COVID-19

DPA: In Response to COVID-19

- 20 March 2020: Office of Management and Budget (OMB) issued a memo summarizing the following measures being taken by Federal Government to speed up procurement efforts during this crisis:
 - Leveraging special emergency procurement authorities under the Federal Acquisition Regulation (FAR) and agency supplements;
 - enhanced use of telework to the extent feasible; and
 - emergency increases to
 - Micro Purchase Threshold (\$20,000 domestic/\$30,000 outside the U.S., up from \$10,000)
 - Simplified Acquisition Threshold (\$750,000 domestic/\$1.5 million outside the U.S., up from \$250,000)
 - Threshold for use of simplified acquisition procedures for commercial items (\$13 million, up from \$7 million).
 - These specific steps allow the Government to purchase more quickly by streamlining the procurement process and limiting or eliminating requirements for full and open competition.

DPA: In Response to COVID-19

- 25 March 2020: Department of Defense (DOD) discusses plans to use its authority under DPA to acquire necessary medical PPE
 - DOD establishes a task force to field requests for PPE from multiple government agencies, and plans to leverage DOD authorities for maximum acquisition flexibility to provide resilient capability in the current health crisis
 - DOD will track “good ideas from industry” in one central repository to allow agencies to find creative solutions for both technical and manufacturing issues
 - DOD is prepared to use its full DPA authority to both rate orders and to allocate materials

DPA: In Response to COVID-19

- 27 March 2020: President issued EO 13911 which delegated additional authority under the DPA- to HHS and DHS
 - Delegates authority under Title III and Title VII to HHS and DHS to use as they deem appropriate, to respond to the spread of COVID-19
 - Delegates to DHS authority to determine, in consultation with the heads of other executive departments and agencies, the proper nationwide priorities and allocation of health and medical resources, including by controlling the distribution of such materials and services in the civilian market, for responding to the spread of COVID-19 within the U.S.
 - In a press release regarding this EO, President Trump stated he was empowering these agencies to use “any and all authority” under the Act to require General Motors and Ventec Life Systems to begin production and prioritize orders for ventilators and masks

DPA: Resources for COVID-19

- <https://www.acquisition.gov/coronavirus>: Federal Government's Coronavirus Acquisition-Related Information and Resources
- beta.SAM.gov: search "COVID-19" for a listing of currently open solicitations (or requests / bids) for products and services needed by the federal government
- <https://www.taftlaw.com/general/coronavirus-covid-19-resource-toolkit>: Taft's Coronavirus (COVID-19) Resource Toolkit
- <https://namissvr.nam.org/namissvr/survey/index.aspx>: COVID-19 Components Survey to allow the National Association of Manufacturers to collect sources to supply the Nation's COVID-19 response for the White House

QUESTIONS?



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